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ABSTRACT

Intended for school district attorneys, administrators, and others responsible for regulation enforcement, the seven articles in this publication concern federal civil rights legislation affecting schools. The substance of the regulations and the procedures employed by regulatory agencies (particularly the Office for Civil Rights) are examined and concrete defenses and strategies useful to school districts are offered. The first chapter deals with the legal aspects of nonpublic placement of handicapped children under Public Law 94-142. The second chapter focuses on the enforcement of Title VI, Title IX, and Section 504 of the Rehabilitation Act of 1973 and offers suggestions useful to those under investigation. In the third chapter, Title VI is examined in relation to prohibition of discrimination in employment. The next chapter looks at procedural and jurisdictional issues in handicap discrimination suits under Public Law 94-142. An overview of the employment discrimination litigation precipitated by Title VII is offered in the fifth chapter. The sixth chapter offers suggestions helpful to a school district charged in a Title VI proceeding. The last chapter explains and analyzes Public Law 94-142, calling it an idealistic, but less than practical law. (JM)

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Statutory Mandates and Agency Enforcement

An Anthology on Procedures and Defenses of

- P.L. 94-142
- Section 504 of the Rehabilitation Act of 1973
- Title VI, Title VII of the Civil Rights Act of 1964
- Title IX of the Education Amendments of 1972

EA 013 119

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STATUTORY MANDATES
and
AGENCY ENFORCEMENT

AN ANTHOLOGY ON PROCEDURES AND DEFENSES OF:

P.L. 94-142
Section 504 of the Rehabilitation Act of 1973
Title VI, Title VII of the Civil Rights Act of 1964
Title IX of the Education Amendments of 1972

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Foreword

The following seven articles have all appeared in past publications of the School Law Seminar Proceedings of the Council of School Attorneys. While three of the selections have been excerpted from the 1977 Proceedings, they remain timely and exceedingly useful today, as do the other selections from the 1978 and 1979 Proceedings.

These articles were chosen for this anthology in order to present a comprehensive manual for understanding and working with the federal legislation in civil rights as it affects the public schools. The procedures employed by the agencies - particularly HEW's Office For Civil Rights - are examined and concrete defenses and strategies are offered.

While legal developments affecting the rights of minorities, women, and the handicapped are rapidly changing everyday, these articles offer an excellent starting point in understanding the basic guidelines of the laws.

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LEGAL ASPECTS OF NON-PUBLIC

PLACEMENT OF HANDICAPPED CHILDREN

By: JEAN H. BILGER, Esquire
Houston, Texas

The law governing services to handicapped children is woven from developments in three parallel areas: educational rights, residential rights and civil rights. Dramatic changes have occurred in each area over the past eight years, and each area has an impact on every service provider's responsibilities.

Some of the developments began in 1971, in federal and state courts, others in proposed legislative amendments, and still others in administrative regulations. Thus, service providers must be aware not only that the law continues to develop rapidly in educational, residential, and civil rights of the handicapped, but also that future changes may come from any of the three branches of government.

Until the 1970's, children with handicapping conditions were accorded few basic rights. Handicapped students were commonly excluded from public schools on the grounds that they could not benefit from education.

Reversing the trend required both a finding that children must be educated and a redefinition of education. One of the best restatements of education came in a 1976 case, In the Matter of Tracy Ann Cox. No. H-4721-75 (N.Y. Fam. Ct. Queens County, April 8, 1976).

> Not all children can be educated as we usually think of the term "education" -- grade school, junior high school, etc. The diagnosis of Tracy Ann's condition is "psychomotor, growth and developmental retardation with seizure disorder." Such a child required another kind of "education" -- how to hold a spoon, feed herself, dress herself, toilet training, etc., in addition to speech therapy, psychiatric and psychological treatment, etc. -- all these and more add up to the education of this and other mentally retarded children, and they are entitled to be so educated.

Clearly, any child could benefit from education under such a standard and state laws which allowed exclusion began to be challenged in federal court. There is no need at this late date to rehash the decisions in PARC and Mills, and the genesis of § 504 of the Rehabilitation Act and Public Law 94-142.

LEAST RESTRICTIVE ENVIRONMENT

With the implementation of 94-142, school districts must now provide an "appropriate" education to every handicapped child, and that education has to be provided in the "least restrictive environment" appropriate for an individual child's educational needs. As school districts have begun the implementation of this law, fewer and fewer children are being placed in private facilities for their education. Such a placement is often not the "least restrictive" on the continuum of placements available for the child. Nevertheless, regulations implementing Public Law 94-142 and § 504 do clearly place a responsibility on the state and local education agencies for providing education at a private placement when necessary, and guidelines are set out for the provision of this education.

Both § 504 and Public Law 94-142 require that a free appropriate public education be provided to each qualified handicapped child. Section 84.33(b)(3) of the regulations implementing § 504 discusses the provision of an appropriate education, and states that:

> A recipient may place the handicapped person in or refer such person to a program other than the one that it operates as a means of carrying out (the requirement of providing an appropriate education). If so, the recipient remains responsible for insuring that the requirements (for the provision of an appropriate education) are met with respect to any handicapped persons they placed or referred.

This section clearly places a responsibility on the local education agency for seeing an "appropriate" education is provided, even if it necessitates the placement of handicapped students in a program not operated by the agency. Section 504 and Public Law 94-142 offer little guidance in defining "appropriate". P.L. 94-142 suggests merely that the program offered must meet state education agency standards and conform to an individual educational plan developed for the student being placed.

The appropriateness of the program is a frequent subject of impartial due process hearings, and several court cases have given some indication of its meaning.

In Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975), the plaintiffs were clearly offered an inappropriate program:

> Plaintiffs bring this action for damages claiming that defendant state and city officials have violated their rights to an appropriate education under the equal protection and the due process clauses of the Fourteenth Amendment to the Constitution. Plaintiffs contend that, as multiple-handicapped children, they are denied equal protection under the Constitution because unlike the programs offered to normal and less severely retarded children, the nature of the educational programs offered them is such that no chance exists that the programs will benefit.
>
> . . . an educational program must be assessed in terms of its capacity to equip a child with the tools needed in life . . . placement of children with the intelligence of two year olds in a program which emphasizes skills such as reading and writing would seem inadequate for their needs. The harmful consequences of denying plaintiffs an adequate education is underscored by the fact that mentally retarded children have greater need for formal education since they are less likely than ordinary children to learn and develop informally.

When the school offers a program that clearly does not produce results, the contrasting results produced by other programs might be used to judge inappropriateness. If the school has nothing appropriate, and the appropriate program can be found elsewhere, the public school system must pay for it. This was the situation in In Re Held, Nos. H-271 and H-10-71 (N.Y. Fam. Ct. 1971). In this case a physically handicapped child was enrolled in the public school system for years, three of which were in special education. During that period, the child's reading level never exceeded that of an average first grade pupil. After a year in private school, the child's reading skills increased by two grade levels. The court ordered the state and school district to pay the tuition for the child to attend a private, special school on the basis that the child's intellectual potential and academic success could only be achieved in that setting.

STATE REMAINS RESPONSIBLE

To return to the requirements of the regulations implementing these laws, § 121a.401 of the regulations implementing Public Law 94-142, places the responsibility for monitoring the education of handicapped children placed in private schools on the state education agency. That section requires that the state educational agency shall see that each child is provided special education and related services, that this education is set out in an individual education program, that the school or facility meets the same standards that apply to the state and local education agency. The school district must also monitor and ensure that the child has all the rights of a handicapped child who is served by the public agency and that the education is provided at no cost to the parents.

The question of funding goes back to the early cases concerning the rights of handicapped children, and in Mills v. Board of Education, 348 F.Supp. 866 (D.D.C. 1972), the defendant school board maintained that they could not afford to provide a public education to all handicapped children. The federal court answered clearly, stating that:

> The defendants are required by the Constitution of the United States, the District of Columbia Code and their own regulations to provide a publicly supported education for these "exceptional" children. Their failure to fulfill this clear duty to include and retain these children in the public school system or otherwise provide them with publicly supported education, and their failure to afford them due process hearings and periodic review, cannot be excused by the claim that there are insufficient funds . . . The District of Columbia's interest in educating these excluded children must clearly outweigh its interest in preserving its financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia public school system whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.

In the past, the practice of many schools that did not offer an appropriate program was to place the handicapped child in a private school and pay a portion of the costs. This practice was widespread and was the source of several lawsuits. The case of Kruse v. Campbell, 431 F.Supp. 180 (E.D. Va. 1977), provides an illustration. In that case a learning disabled child, Daniel Kruse, was not able to attend public school because no appropriate program was available. The school board approved a tuition grant of $1,250 for Daniel's attendance at a private school; however, the tuition at the private school was $4,645 per year. This caused a problem for Daniel's parents who could not afford to supplement the tuition grant. The District Court found that this practice completely denied an opportunity for an appropriate education to the handicapped children of poor parents for whom no appropriate, public education program existed, and that such practice was indeed discriminatory. That case did go up to the Supreme Court and was remanded for further consideration based on the Rehabilitation Act.

SCHOOL DISTRICTS MUST FOOT THE BILL

Included in the notion of "free" education is the payment for related services needed by a handicapped child to benefit from special education. The absence of any related services may render the special education offering ineffective and thus eliminate the provision of an appropriate program.

"Related services" means developmental, corrective, and other supportive services which might include counseling, early identification, medical diagnostic services, occupational therapy, parent counseling and training, physical therapy, psychological services, reaction, school health services, social work services, speech pathology, and transportation. Each child may not need any or all of these services, but where a service is needed and not made available, there might be a denial of access to an appropriate program. Similarly, where the service offered is wholly inadequate, such as physical therapy for 15 minutes twice a week for a cerebral palsied child when 1 hour per day is recommended by the evaluation staff, there may still be a denial of an appropriate program. Section 84.33(c)(3) of the § 504 regulations discusses residential placement. That section provides that:

> If placement in a public or private residential program is necessary to provide a free appropriate public education for the handicapped person because of his or her handicap, the program, including non-medical care and room and board shall be provided at no cost to the person or his or her parents or guardian.

One responsibility of the state educational agency that we mentioned earlier is to see that a handicapped child referred to a private school receives an education in conformance with an individualized education program, or "IEP." Section 121a.347 of the 94-142 regulations, discusses the development of IEPs for children placed in private schools. If a district places a child in a private school as a means of providing special education and related services, then before that placement, the district must conduct a meeting to develop an IEP, and the representative from the private school should attend. IEPs must also be developed for students already placed in private schools by the school system before these laws went into effect. If, after entering the private school, a meeting is held by the private school to review and revise the IEP, then the local district must see that the parents and the district representative are involved in any decision concerning the IEP and agree to any proposed changes before those changes are implemented. The district and the state educational agency remain responsible for compliance with the IEP requirements, even if the private school or facility implements the IEP.

SEC. 504 PROVIDES PAYMENT EXCEPTION

There are situations where a handicapped child is placed in a private school or residential facility and the local district will not have to bear all of the cost of this placement. One such instance is described in a comment to § 84.33 of the 504 regulations. That comment states:

> When residential care is necessitated not by the student's handicap but by factors such as the student's home conditions, the recipient is not required to pay the cost of room and board.

In this instance all other costs, for instance the cost of the educational program, would be picked up by the district. I am not familiar with any situations or cases where this comment has been the basis of a placement of a handicapped child, but if the district were to attempt to use this exception, they would probably have to show that they have appropriately evaluated the child to determine his educational needs, and that there is in fact a program in the district to accommodate the individual needs of that child. The district may also need to provide some proof that the child's education is being interfered with by his home life to such an extent that an appropriate education cannot be obtained while the child is residing at home. In such a case, the district will still have to pick up the portion of the cost that is attributable to educational needs and related services.

If a handicapped child has available a free appropriate public education and the parents voluntarily choose to place the child in a private school, then the local district is not required to pay for the child's education at that facility. Disagreements between parents and their school districts regarding the availability of a program appropriate for the child, and the question of financial responsibility, can be resolved through an impartial due process hearing. In the case of Howard S. v. Friendswood Independent School District, 454 F.Supp. 634 (S.D. Tex. 1978), the parents of a learning disabled, emotionally disturbed student placed their child in a private school when the district failed to offer a free appropriate public education. Where the school district failed to provide an appropriate education, the court did not find that the parents' action in placing their son in a private school was voluntary, and the school district was ordered to pay for the cost of the private placement until an appropriate education could be received within the district. Hence, an "involuntary" placement on the part of the parents may not relieve the school district of liability for costs.

VOLUNTARY PLACEMENT RESPONSIBILITIES

When there is a voluntary placement in a private school, the local district is still required to provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the district. The district must develop IEPs for all private school children who are receiving special education or related services from that district. The district will maintain control over any personnel or equipment placed in a private school to provide these services. This leads to a number of problems for local districts, however, who must determine how in fact they can provide special education services to children voluntarily placed in private facilities. Section 121a.454 of the 94-142 regulations states that services may be provided through an arrangement such as dual enrollment, educational radio and television, or the provision of mobile educational services and equipment.

Many school districts are not set up to place educational televisions or mobile educational units on the campuses of private schools. Where dual enrollment is considered, many state education agencies will require that a student be enrolled for a certain number of hours during the day to allow the local district to receive ADA funds for that child. How does the district accommodate a child who needs one hour of physical therapy three times a week when the state requirement for ADA purposes is that the child be in school for 2 hours a day? Does the local district have to provide transportation of children to and from private schools when they are coming onto the public campus to receive some particular service? These are questions that are going to cause local districts some problems as they strive to fully comply with the requirements of Public Law 94-142, which provides in its regulations:

> Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency, and each local educational agency shall provide private school handicapped children with genuine opportunities to participate in special education and related services consistent with the number of those children and their needs. § 121a.452.

A STUDENT'S NEEDS - THE BOTTOM LINE

One final consideration that districts have to take into account when determining the placement of a handicapped child is the requirement that the child be placed in the least restrictive environment that can meet his or her educational needs. Placement in a private school is one of the most restrictive placements to be chosen from the continuum that the school districts must offer. Remember that Congress enacted these laws in order to ensure that non-handicapped children have the opportunity to learn to relate naturally to children who are handicapped. Congress' conviction that handicapped children should be educated with non-handicapped children as much as possible was based in part on extensive expert testimony that a great many handicapped children are able to learn in regular school classes if they are provided supplemental assistance. The impact of this requirement was clearly stated in the case of Hairston v. Drosick, 423 F.Supp. 180 (S.D. W.Va. 1976), where the court stated that:

> The needless exclusion of these children and other children who are able to function adequately from the regular classroom situation would be a great disservice to these children. A child's chance in this society is through the educational process. A major goal of the educational process is the socialization process that takes place in the regular classroom, with the resulting capability to interact in a social way with one's peers insofar as it is at all possible. This conclusion is further enforced by the critical importance of education in this society.
>
> . . . school officials must make every effort to include such children within the regular public classroom situation, even at great expense to the school system.

It is clear, therefore, that the decision where to place a child must be based on education needs. It cannot reflect solely administrative convenience or the absence of any alternatives. The educational justification must be traceable directly to the individual educational plan.

Physical obstacles often limit the accessibility of some programs. In considering placement alternatives, architectural barriers must not be allowed to interfere. Schools have often denied children in wheelchairs and blind children access to regular classes because of curbs, narrow doors, lack of elevators in multi-story buildings, transportation problems, inaccessible restrooms, and fear about evacuation in case of emergencies. Those are real problems, but they must no longer be allowed to bar admission of a child who otherwise could participate with the non-handicapped. The school should make any possible alterations such as ramps, handrails, and automatic doors; use aides where they would help; relocate classes and therapy facilities on the first floor; and anything else that would help.

Another basis for the choice of alternatives must be the consideration of "any potential harmful effect on the child." In the case of non-public placement, the stigma of being separated into a special school must be weighed against the problem of retention in the regular class. So far, the courts are finding that the problems of retention with the district are far less than the possible stigmatization of the child.

It appears then, that before a district chooses to place a handicapped child in a private placement, they should carefully evaluate the child and document their efforts to provide a less restrictive placement. If a private placement is determined to be the most appropriate to meet the child's needs, the district should not feel that that is the end of their responsibility. There remains a continuing obligation to oversee the program and watch the child's progress, so that as achievements are made, the education provided will continue to be appropriate.

WHAT TO DO WHEN H.E.W. CALLS

OFFICE FOR CIVIL RIGHTS ENFORCEMENT OF TITLE VI, TITLE IX, AND SEC. 504

BY: CARMELA M. BOWNS, ESQUIRE
Seattle, Washington

The two units within the Department of Health, Education & Welfare with which school districts and their attorneys deal most frequently are the Office of Education (OE) and the Office for Civil Rights (OCR). The major thrust of this article will be the "calls" from the Office for Civil Rights.

Initially, it is important to recognize when OCR is calling. In order to recognize a "call" from OCR, it is important to know the basic functions of OCR in relation to school districts. From a school district's point of view, the Office for Civil Rights has two major responsibilities:

I. OCR is responsible for enforcing compliance with federal civil rights statutes, including the following:

(a) Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. Title VI prohibits discrimination on the basis of race, color, or national origin.

(b) Title IX of the 1972 Education Act Amendments, 20 U.S.C. 1681. Title IX prohibits discrimination based on sex.

(c) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 706. Sec. 504 prohibits discrimination based on handicap.

II. OCR is also responsible for developing administrative regulations necessary to implement these statutory provisions. These regulations are codified as follows:

(a) Title VI: 45 C.F.R. 80 [race, color, national origin]

(b) Title IX: 45 C.F.R. 86 [sex]

(c) Sec. 504: 45 C.F.R. 84 [handicapping condition]

The enforcement of statutes and regulations by the H.E.W. Office for Civil Rights is the function of that office which brings most school districts and their attorneys into contact with OCR. Enforcement procedures will be the major focus of the remainder of this article...the calling cards of OCR.

METHODS OF ENFORCING COMPLIANCE

The Office for Civil Rights enforces or seeks compliance with the civil rights statutes and regulations in three different ways:

(1) COMPLAINT INVESTIGATION: Any individual or organization may file a complaint with the regional Civil Rights Office. There are no specific standards that must be met in a complaint, and there are no particular facts which must be alleged as the basis for an acceptable complaint. The individual or organization filing the complaint can allege discrimination on the basis of a single incident or can allege system-wide discrimination. The form and scope of the complaint is left completely to the discretion of the complainant.

(2) COMPLIANCE REVIEW: The Office for Civil Rights itself may initiate a review of a school district's compliance with any one or all of the civil rights statutes. To date there have been only a few compliance reviews conducted by OCR in major school districts (Philadelphia, New York, Chicago, and Los Angeles), but the reviews are very comprehensive and take several months or even years to complete.

(3) DATA COLLECTION: The Office for Civil Rights collects statistical reports and information from school districts on a somewhat regular basis. Examples of such information and data collection include the 101-102 Civil Rights survey taken in 1976-77, the EEO-5 Staff Reports, and the 1973 "*Lau* Survey."

As an example of OCR involvement with school districts in the area of enforcement, the following Title VI (nondiscrimination on the basis of race) discussion will focus on "how to know when HEW is calling" and some suggestions on how to respond to the call:

TITLE VI EXAMPLE

The Civil Rights Act of 1964 (42 U.S.C. 2000) includes provisions in Title VI which prohibit discrimination on the basis of race, color, or national origin in any program or activity which receives funds from the federal government. Title VI provides the following:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.
>
> 42 U.S.C. 2000d

In essence, the recipient of federal funds enters into a contractual agreement with the federal government. In exchange for receiving federal grant funds, a school district agrees that it will not discriminate on the basis of race (color or national origin) in any of its programs or activities.

The simplicity and brevity of the statute is deceptive, since the scope of "any program or activity" is extremely broad. In practice, Title VI applies to, but is not limited to, the following variety of school activities: student assignments, staff assignments, student discipline procedures, services and programs for students whose native language is other than English, and special education placements and services.

The ultimate sanction for violating Title VI (discriminating on the basis of race) is the termination of all federal funds to the school district.

THE ENFORCEMENT SEQUENCE

The enforcement sequence for Title VI, as well as for the other civil rights statutes, is established by 42 U.S.C. 2000d-1, and is set up in three stages, as follows:

(1) Investigation;

(2) Voluntary compliance or negotiations;

(3) Administrative hearing.

The Department of Health, Education & Welfare has been a defendant in the case of Adams v. Matthews, 391 F.Supp. 269 (1975). In this case, the Department was sued for not properly enforcing the provisions of Title VI in seventeen southern and border states. In the summer of

1976, the District Court Judge issued an order which included timelines that the Office for Civil Rights was to follow in its enforcement of Title VI.

Those timelines establish that OCR has ninety (90) days within which to investigate a complaint filed with it. An additional ninety (90) days is allowed for the second stage of enforcement— voluntary compliance and negotiated compliance. If, at the end of that period no resolution has been achieved, the Office for Civil Rights then has thirty (30) days within which to initiate administrative hearing procedures. Thus, under the Adams order, the total time permitted from the initial investigation of a complaint until the initiation of administrative hearing procedures is a maximum of 210 days or approximately seven months.

TIME LIMITS BROADLY ENFORCED

In the similar case of Brown v. Weinberger, 417 F.Supp. 1215 (1976), the Department of Health, Education & Welfare was charged with failing to enforce Title VI in the area of public education in thirty-three nothern and western states. An order paralleling the Adams case was issued, requiring the same 90-day investigatory period, a 90-day voluntary/negotiated compliance period, and a 30-day limit on the initiation of an administrative hearing.

Based on the Adams and Brown Title VI enforcement timelines, the Office for Civil Rights made an administrative decision to apply the same time limits on a nationwide basis, including school districts which had not been included in either lawsuit. This decision was made without notice to the newly-affected districts, without the benefit of a public hearing, and without any comment period. It is my opinion that this unilateral action by the Office for Civil Rights constituted rulemaking in violation of the specific procedures required by the Administrative Procedures Act. To date, the OCR decision has not been challenged on the basis of improper rulemaking action.

Aside from the legal question raised by this administrative decision, the OCR action on timelines needs to be considered from a practical point-of-view as well. Is a 210-day period a reasonable time within which to investigate, negotiate, and bring a district to a hearing? In some instances, it may be enough time. However, in other cases, such a time frame is clearly insufficient. For example, the Seattle (WA) School District was notified in July, 1975 that its Emergency School Aid Act (ESAA) application was being rejected because of civil rights ineligibility. The areas of such ineligibility were (1) inappropriate staff assignments and (2) Some questions about the adequacy of service to students whose home language is other than English.

It was not until July, 1976, or one full year later, that the two issues were resolved through the signing of a Memorandum of Understanding on each issue. Under the Adams and Brown timeline, only seven months would have been allowed to resolve these issues. An administrative hearing might have been forced on issues that were ultimately resolved through the stage two process.

Perhaps these two issues could have been resolved within the seven-month period, instead of the actual twelve months. However, this case involved only two issues. What about cases which are more complex and involve numerous issues? I am very uneasy at the thought of trying to complete the entire three-stage process with OCR (investigation, negotiation, and hearing initiation) on such a complex issue as student segregation in a period of 210 days or less. The unreality of an across-the-board timeline, regardless of the complexity of the issues, is apparent. Nevertheless, this is the position taken by the Office for Civil Rights.

DEFERRAL OF FEDERAL FUNDS

Once a school district is at the third stage of enforcement proceedings and has received a notice of an administrative hearing, federal funds coming to the district are usually "deferred." This means that the district is not permitted to receive new monies which come primarily from grants (ESAA; Elementary and Secondary Education Act, Title VII, etc.) as opposed to entitlement funds (such as Title I, ESEA) which are permitted to continue.

The Department of H.E.W cites 42 U.S.C 2000d-5 as the statutory source for its authority to defer these funds. However, the language of 42 U.S.C. 2000d-1, which states that "termination of or refusal to grant or continue assistance" is to occur only after there is an express finding, on the record, of a Title VI violation, gives rise to a solid basis for legal challenge to OCR's authority to make such deferrals. Unfortunately the 1976 Education Amendments add some language on deferrals which confuses the issue.

There are two other important items contained in 42 U.S.C. 2000d-1, as follows:

> (1) In the case of any termination of or refusal to grant or to continue assistance because of a finding of a Title VI violation, the termination or refusal shall be limited in its effect to the particular program or part thereof in which noncompliance was found; and

(2) No termination of or refusal to grant or to continue funding shall occur until the Department has determined that Title VI compliance cannot be achieved by voluntary means.

These provisions are referred to as the "pinpoint provision" since termination is to be limited to particular programs or parts thereof, and the "voluntary compliance" provision since compliance must first be sought on a voluntary, rather than coersive, basis.

These two provisions were the basis of an injunctive action brought as Mandel v. U.S. Dept. of Health, Education, and Welfare, 411 F.Supp. 542 (1976). In that case, the Baltimore City school system obtained an injunction which prevented continuation of administrative proceedings. The injunction was granted because H.E.W. failed to pinpoint the particular programs or program parts within the school system which were allegedly being operated in violation of Title VI and failed to seek, in good faith, voluntary compliance from the Baltimore district. In his opinion, District Court Judge Northrup criticized the procedures used in the case by the Department. He said that that H.E.W had. . .

> . . .arbitrarily and whimsically failed to attempt to work toward compliance by voluntary means and have vindictively refused to assume a programmatic approach.
>
> 411 F.Supp. 542, 563-64 (1976)

The Court further held that:

> [D]efendants' actions were in brazen defiance and in direct contravention of Title VI and paragraph 22 of defendants' own policy statement.
>
> 411 F.Supp. 542, 556 (1976)

[NOTE: This case was appealed and was argued in the spring of 1977. A decision had not been issued at press deadline]

REGIONAL UNIFORMITY OF CIVIL RIGHTS ENFORCEMENT

The topic of regional uniformity of civil rights enforcement, the application of remedial standards among the various regional offices of OCR, is one which should receive more attention. A reasonable argument can be made that regional uniformity is a myth rather than a practice of H.E.W. For example, school districts in

Seattle, Los Angeles, and Chicago were all informed by OCR that their staff assignments violated Title VI. However, the settlement (negotiated compliance) requirements for Seattle were different from those imposed in Los Angeles. The remedial timeframe for compliance was different in Seattle and Chicago. Seattle was given thirty days to reassign its staff according to a prescribed percentage range. Chicago was not told what its staff plan should be like, nor was Chicago given a thirty-day deadline.

I raise the question of apparent variations and lack of regional uniformity as a way of calling attention to 20 U.S.C. 1602. This statutory provision says that Title VI guidelines and standards shall be uniformly applied to all regions of the United States. I do not know of any litigation which has arisen under 20 U.S.C. 1602; however, I believe that this provision would be useful in challenging inconsistent remedial standards. It would also be useful in helping a school district determine what standards are being used to trigger findings of discrimination by the Office for Civil Rights.

WORKING WITH THE OFFICE FOR CIVIL RIGHTS

Those who have worked with the Office of Civil Rights know that it is difficult to find out what criteria or standards are being applied to your school district. It is even more difficult to determine what standards are being applied to other school districts and make any comparision between different districts. The provisions of 20 U.S.C. 1602 may be an appropriate vehicle to obtain this information (along with the Freedom of Information Act).

Before proceeding to discuss the compliance activities of OCR in the data collection area, there are several suggestions which I might make for school districts which become involved with OCR in an investigation of Title VI compliance or in compliance review enforcement activity:

(1) Determine what it is that OCR is saying. Do not hesitate to request the specifics of its concern. Ask for the source of its authority to take the actions which are being taken or for whatever requirements are being imposed. Request copies of the standards and policies that are being used to determine whether or not discrimination has occurred. Use the federal Freedom of Information Act (5 U.S.C. 552) to assist if needed.

(2) Verify for yourself the information you are given. Do not just take it on faith as being accurate. Read for yourself the statutes and regulations, despite the tedious task. That is the only way to be confident that the statute is being correctly interpreted and applied.

(3) Determine the operative remedial standards and how such standards were established. On occasion, internal working documents are applied by the Office for Civil Rights as if they had the force and effect of an officially promulgated regulation. The Freedom of Information Act should assist these efforts. If the defense to a Freedom of Information request (reason for refusal) is that the information is privileged internal memoranda, then such standards are being improperly applied and should have no proper place in enforcement proceedings.

(4) Contact other attorneys and other school districts to learn if they have had experiences from which you can learn. This suggestion is, I believe, of critical importance. Information about what other school districts are being told by OCR, as well as information about how they are resolving issues may provide you with information about how the issues can be resolved in your district and help you make informed decisions and recommendations.

ENFORCEMENT THROUGH DATA COLLECTION

The Office for Civil Rights uses data collection as another method of fulfilling its obligation for oversight of compliance with the civil rights laws. Most of the data collection tools are known to school district attorneys (or should be!).

The 101-102 Civil Rights Survey used in 1976-77 is a comprehensive data collection instrument covering Title VI, Title IX, and Section 504. In addition to being a comprehensive survey instrument, the data requirements of the survey are sometimes awkward and cumbersome. For instance, some data was requested retroactively. Another problem was that data for the 1975-76 school year was to be supplied on a 1976-77 data base which was different from the data base used for data collection in the prior year. The OCR deadline for supplying the information was also impossibly short for many school districts.

After initially informing school districts that the 101-102 survey forms would not be distributed for the 1977-78 school year (although school districts would be expected to collect and retain the information in their files), the Office for Civil Rights has changed course and has told school districts the forms will be required in 1977-78. The decision is, of course, being reconsidered and the possibility exists that district will not be resurveyed.

The reason for the possible noncollection of 101-102 forms for 1977-78 is OCR's failure to obtain clearance for the data collection from the Office of Management and Budget. Clearance of such data collection is required by the Federal Reports Act, 44 U.S.C. 3501. The purpose of the Act is to minimize federal data collection activity and its consequent burden on the subjects of such data collection. The Act applies when a federal agency wishes to ask ten or more agencies or individuals identical questions. Prior to CMB approval of data collection, that agency may call a hearing on the proposed collection program. At that hearing, the data collection subjects, such as school districts, would have the opportunity to appear and give testimony.

FEDERAL PAPERWORK CONTROL ACT

Another federal statute, the Federal Paperwork Control Act, enacted as §406 of the Education Amendments of 1976, establishes a structure whereby school districts may comment on proposed data collection by OCR. The Act requires the agency proposing the data collection to justify the need for the information and estimate the number of person-hours required to gather the information. The Act further requires that there be a 30-day comment period prior to the agency's submission of the request for approval of the data collection project to the Office of Management and Budget. The comment period would allow for school districts to critique the data collection proposal.

In responding to Office for Civil Rights data requests, some of the same suggestions made with regard to response to compliance review/investigations apply. Do not hesitate to seek clarification of the type of information being requested or the reasons for the request. In preparaing the information for submission, take care that the material you provide is accurate and answers the questions being asked. Accuracy of information is crucial since the school district may later be asked to verify or act upon the information supplied to OCR. If the time period for response to questions is too short, it may be better to request an extension of time than to risk providing unverified, potentially inaccurate data.

COORDINATE RESPONSES TO INFORMATION REQUESTS

Contact other school districts to determine how they are handling the data request and coordinate your responses with the state educational agency. Finally, I strongly suggest that you take advantage of the comment period provided under the Federal Paperwork Control Act and the Federal Reports Act. In order to be fair to the Office for Civil Rights, districts should present criticisms of data collection activities before the activity is implemented rather than waiting to complain after the project has begun.

It should be noted that the comments in this article are made with constructive motives. It is not the author's purpose to vent hostility toward the Office for Civil Rights for their efforts in enforcing the civil rights statutes. At the same time, the enforcement of any law in an arbitrary or unstructured manner only leads to inequities and loss of respect for the enforcement process and the rights it seeks to enforce. It is the purpose of this article to provide a framework for school districts to participate in the enforcement process in an orderly manner and ensure that uniform enforcement procedures are used in a manner which follow established legal requirements.

WHAT TO DO WHEN H.E.W. CALLS: TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

BY: DAVID B. OWEN, ESQUIRE
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To resist the demands of H.E.W., and thereby risk the cut off of federal funds, is a terrifying prospect to the majority of school districts. The long, exhaustive, expensive procedure of a termination proceeding under Title VI of the Civil Rights Act of 1964 [1] is, moreover, an arduous experience few school districts will willingly endure in order to vindicate their positions.

It is hardly suprising, therefore, that not many school districts are willing to undertake the adversary role where H.E.W. is concerned. To my mind, this circumstance is singularly unfortunate. I am afraid that H.E.W. grows arrogant in its ways and positions when it becomes accustomed to easy acquiesance or crumbling acceptance by school districts when H.E.W. puts on the heat.

The net result is that H.E.W. dictates go relatively untested by the adversary process, and there is not a sufficient body of precendent to operate effectively as a check and balance against excesses. Such cases as Mandel v. H.E.W.[2] are few and far between.

In my judgment H.E.W. has gone far beyond what the framers of the Civil Rights Act intended or, in fact, authorized in Title VI. I think that this has been particularly true in the area of employment practices of school districts.

LEGISLATIVE HISTORY

A brief examination of the legislative history is revealing. In the original version of the Civil Rights Act, Section 601 of Title VI [3] prohibited not only discrimination against beneficiaries of federally assisted programs (i.e. school children) but also specifically prohibited discrimination in employment (i.e. school teachers). This is not to be confused with the protections against discrimination in employment under Title VII, where there are significant differences in methods of enforcement.

The proposed Title VI legislation was, however, revised during the summer of 1963. The revised version of Section 601 no longer contained any language relating to employment. In hearings before the House Rules Committee on the revised version, Congressman Avery sought and was given assurances by Congressman Celler that Title VI in its revised form had no application to employees:

> Mr. Avery. Let me restate the question...This Title (Title VI) applies only to the policy of the management of the school as far as students are concerned?
>
> Mr. Celler. That is correct.
>
> Mr. Avery. It has no relation to other employees of the facility?
>
> Mr. Celler. None whatsoever.[4]

That Title VI did not deal with employment was repeated again and again: in a letter by then Attorney General Kennedy; during House debate where Congressman Mathias said that it "is not contemplated that even a conviction under Title VII would have any bearing on payments covered by Title VI;[5] in a memorandum by the Justice Department[6]; and, finally, in order to leave no doubt that Title VI did not deal with employment, a new section, Section 604[7], was added which specifically provided that federal agencies would have no authority under Title VI as to any employment practice, except where the providing of employment was the primary objective of the federal financial assistance. Moreover, the Regulations under Title VI, as originally promulgated, limited their application to employment practices to the one exception of Section 604, namely, "where a primary objective of the federal financial assistance...is to provide employment".[8]

Notwithstanding the intentions of the framers of the Civil Rights Act as expressed in committee and on the floor, and notwithstanding the express language of the statute, the interpretations of the Justice Department, and the Regulation, H.E.W. promulgated a memorandum in 1971 which stated:

> Since the Bradley and Rogers decisions of the Supreme Court in 1965, it has been clear that (Title VI) precludes the assignment of teachers

> ...on a racially segregated basis. From more recent decisions of the courts of appeal, it has become equally clear that Title VI also precludes discrimination in the hiring, promotion, demotion, dismissal or other treatment of faculty or staff serving the students.[9]

Bradley[10] and Rogers[11], H.E.W. failed to say, were not Title VI cases at all, and merely held that the plaintiffs were entitled to an evidentiary hearing in the trial court on Fourteenth Amendment issues of discrimination in faculty assignment.

Furthermore, H.E.W. succeeded in adding a paragraph to the Regulations[12] which introduced the idea that Title VI would apply to discrimination in employment after all, even where the primary object of the federal program was not employment, if the employment practice tended to prevent nondiscriminatory treatment of the beneficiary of the program. By some curious logic, the Regulation now says that discrimination in the employment, dismissal, promotion, demotion, or assignment of a teacher is a denial of equality not to the teacher, but to the students.

H.E.W. ENFORCEMENT

That H.E.W. is presently exerting the sanctions of Title VI in a wholesale effort to control the employment practices of school districts across this country--quite apart from Title VII, Title IX, the Fourteenth Amendment, or Section 1983--is a fact to which many can testify from hard experience.

What is worse, H.E.W. has chosen at this late date, to assert for the first time, in a number of cases, that dismissals of teachers as long ago as 1965--before Title VII even went into effect--were violations of Title VI. H.E.W. demands that these school districts take "affirmative action" to purge themselves of the "continuing effects of such discrimination" by reinstating the teachers and paying them back pay and other damages.

Resolution of such problems is additionally complicated by the Adams case[13], where the District Court for the District of Columbia entered its order that "where it appears that a school district is in violation or presumptive violation of Title VI, the agency (HEW) has a duty under Title VI to commence enforcement proceedings by administrative notice of hearing or any other means authorized by law where efforts to obtain voluntary compliance do not succeed within a reasonable period." The Court then proceeded to set up a time table for the commencement of such enforcement proceedings to terminate federal funds.

The school districts concerned were, of course, not parties to the Adams case. Nevertheless, the effect has been that a school district suddenly finds itself charged with a violation of Title VI of which it had had no prior notice; that the events in question occurred so long ago that the school district has great difficulty in getting together an accurate account of the facts; that there are serious and complicated legal questions involved; and that suddenly H.E.W. says that it has run out of time to discuss the matter and must file enforcement proceedings, not because H.E.W. has determined that "compliance cannot be secured by voluntary means" [14], as required by the Statute and the Regulations, but because of the Adams timetable. The question is raised whether H.E.W. may not on occasion have been more precipitous and less statemanlike than Adams requires.

CONGRESSIONAL INTENT

Such precipitous filing of enforcement proceedings seems, moreover, to be directly contrary to Congressional intent as expressed, for example, by Senator Pastore, one of the leading sponsors of the Civil Rights Act, when he stated in debate on the floor of the Senate:

> I wish to repeat: Cutoff of assistance is not the objective of Title VI. Fund cutoff is a last resort, to be used only if all else fails to achieve the real objective--the elimination of discrimination in the use and receipt of federal funds.[15]

The Senator's remarks hold a bitter irony in the H.E.W. has initiated proceedings to cut off assistance to school districts which long ago abolished the dual system once mandated by State law and are not accused of any present discriminatory practice. H.E.W.'s position, as I understand it, is that if there has ever been a teacher dismissal in violation of Title VI--even if it was 10 or 12 years ago and even if the school district is not accused of any present discrimination in employment--federal funds must be terminated unless the school district knuckles under and reinstates and pays back wages and damages. The theme seems to be: once a sinner, always a sinner. Yet, it was that same Senator Pastore who told the United States Senate that:

> It is not the intention of the framers, the sponsors, or the supporters of Title VI of H.R. 7152 to enact punitive statutes. We do not wish to be vindictive. We do not wish to be punitive. We do not wish to be unreasonable.[16]

I would submit that the sanction of termination of funds is unnecessarily harsh to the point of being punitive and vindictive and does not serve the public policy of "elimination of discrimination in the use and receipt of federal funds", when the private rights really at issue, namely, the right of the teacher to reinstatement and/or to back pay and damages, could have been directly litigated by the teacher in question, or by the government under the provision of Title VI which says that "Compliance ...may be effected...by any other means authorized by law." [17]

Grant Cook might well comment on this point that even the prior litigation of those issues does not deter the H.E.W. from later seeking to cut off funds, as evidenced by the pending case of Sweeney Independent School District v. Mathews[18], where H.E.W. instigated administrative proceedings on a matter that had already been decided by the District Court and was on appeal before the Fifth Circuit.

LIMITATIONS AND LACHES

Patently, there are serious issues of limitations and laches in these cases where the events in question took place so long ago. So far as I know, no court has ruled directly on those issues in a Title VI case. There is no period of limitation specifically set forth in Title VI. However, it is a long standing rule that in such cases the courts borrow from the states the most applicable period of limitations. H.E.W. asserts, on the other hand, that it is seeking to vindicate public rights and that in asserting rights belonging to the sovereign, it is immune to the doctrines of limitations and laches. However, the Fifth Circuit has held in Griffin Wheel [20] and Georgia Power[21] cases that suits for back pay and damages are conduits for the recovery of private rather than public rights, and are subject to limitations and laches.[22] At least one Administrative Law Judge has sustained the school district's motion to dismiss a termination proceeding, noting that H.E.W. has agreed to dismiss the proceeding if the school district would pay the individual teachers back pay and damages, and that the government, therefore, was employing a legal conduit for the recovery of sums due individual citizens rather than the Treasury. Citing the Griffin Wheel and Georgia Power cases, the Administrative Law Judge held that "It is well established that suits for back wages are private rather than public rights".[23]

ADDITIONAL H.E.W. SANCTIONS

Another evil of such cases is that although a school district's federal funds cannot be terminated until a final decision is reached, the school's right to apply for funds for new programs is suspended until the outcome. This also applies to funds for programs previously approved but for which funding is annually renewed. The process of the administrative proceedings and ultimate judicial review is so long that the suspension referred to will almost certainly result in substantial loss of federal funds to the school district even when it is ultimately vindicated. Children are the losers.

Thus, we return to our point of departure. There are many questions and few definitive answers. H.E.W. does not have enough adversaries to develop the body of precendent that could provide those answers. Too often, H.E.W. governs by capitulation of school districts that cannot afford the investment in time and money that is necessary to do otherwise. And the ultimate irony is the loss of educational opportunity to children, for whose benefit Title VI and the federal programs are supposed to exist.

FOOTNOTES

1. 42 USC § 2000d, et seq.
2. Mandel v. H.E.W., 411 F. Supp. 542 (Maryland, 1976)
3. 42 USC § 2000d.
4. Hearings on H.R. 7152 before the House Committee on Rules, 88th Congress, 2nd Session, at 198 (1964)
5. 110 Cong. Rec. 10076 (1964)
6. Proposed Civil Rights Act of 1964, H.R. 7152 (February, 1974)
7. 42 USC § 2000d-3.
8. 45 CFR § 80.3
9. H.E.W. memorandum, 1971
10. Bradley v. School Bd. of Richmond , 382 US 103 (1965)
11. Rogers v. Paul , 382 US 198 (1965)
12. 45 CFR § 80.3(c)(3)
13. Adams v. Weinberger , 391 F. Supp. 269 (D.C. 1975)
14. 42 USC § 2000d-1; 45 CFR § 80.8(c)
15. 110 Cong. Rec. 7059 (1964)
16. Ibid.
17. 42 USC § 2000d-1
18. Civil Action No. 76-G-28 , USDC (S.D. Tex.)
19. O'Sullivan v. Felix , 233 US 318 (1914);
    Beard v. Stephens , 372 F.2nd 685 (5th Cir. 1967);
    Johnson v. Railway Express Agency, 421 US 454 (1975);
    Roshell v. Alabama Mental Health Board,473 F.2nd 1369 (5th Cir.1973);
    Bell v. Aerodex, Inc., 473 F.2nd 869 (5th Cir. 1973);

FOOTNOTES - Continued

19. (cont'd)

Blair v. Page Aircraft Maintenance, Inc., 467 F.2nd 815 (5th Cir. 1973);
Dupree v. Hutchins Brothers, 521 F.2nd 236 (5th Cir. 1975);
Johnson v. Goodyear Tire & Rubber Co., 491 F.2nd 1364(5th Cir. 1974).

20. EEOC v. Griffin Wheel Co., 511 F. 2nd 456 (5th Cir. 1975)

21. U.S. v. Georgia Power Co., 474 F. 2nd 906 (5th Cir. 1973)

22. See also:

- Johnson v. Goodyear Tire & Rubber Co.,
  491 F.2nd 1364 (5th Cir. 1971)
- Pettway v. American Cast Iron Pipe Co.,
  494 F.2nd 211 (5th Cir. 1974)
- Guerra v. Manchester Terminal Corp.,
  498 F.2nd 641 (5th Cir. 1974)
- Draper v. United States Pipe & Foundry Co.,
  527 F.2nd 515 (6th Cir. 1975)
- EEOC v. Union Oil Co. of California ,
  369 F. Supp. 579 (N.D. Ala. 1974)
- Banks v. Seaboard Coast Line Railroad Co.,
  360 F. Supp. 1372 (N.D. Ga. 1973)
- Taylor v. Armco Steel Corp.,
  373 F. Supp. 885 (S.D. Tex. 1973)
- Payne v. Weirton Steel Co.,
  397 F. Supp. 192 (N.D. Va. 1975)
- Woods v. Local Union No. 613,
  404 F. Supp. 110 (N.D. Ga. 1975)
- Freeman Motor Convoy, Inc.,
  409 F. Supp. 1100 (N.D. Ga. 1976)
- Franks v. Bowman Transportation Co.,
  495 F. 2nd 398 (5th Cir. 1974)
  reversed on other grounds 47 L.Ed.2nd 444 (1976)

FOOTNOTES - Continued

22. (cont'd)

Federal Home Loan Bank Board v. Elliott, 386 F.2nd 42 (9th Cir. 1967)

23. H.E.W. v. Cleburne ISD, Docket No. S-107, Administrative Proceeding in the Department of Health, Education and Welfare.

SOME PROCEDURAL/JURISDICTIONAL ISSUES IN HANDICAP DISCRIMINATION SUITS UNDER PUBLIC LAW 94-142

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This paper will deal with various legal theories that have evolved since the passage of 94-142 and § 504, as a result of private litigants' attempts to enforce these statutes in courts of competent jurisdiction. The emphasis will be on the jurisdictional and procedural aspects of handicap litigation.

PRIVATE CAUSE OF ACTION UNDER P.L. 94-142

A cause of action to private litigants is expressly provided in the statute. 20 U.S.C. § 1415(e)(2):

> "Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."

20 U.S.C. § 1415(e)(4) provides that the district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

The statute expressly requires exhaustion of all state administrative and judicial procedures prior to a private party's right to bring suit in a court of competent jurisdiction. 20 U.S.C. § 1415(b)-(e).

Section 1416 contemplates that the Commissioner of Education has the authority to withhold payment of 94-142 funds to the State whenever he finds that there has been a failure to comply substantially with any provisions of § 1412 or § 1403, or a failure to substantially comply with the statute by a local educational agency or intermediate educational unit approved by the State Educational Agency pursuant to the state plan.

In Campochiaro v. Califano, Civil Action No. H-78-64, ____F. Supp._____(D.C. Conn., decided May 19, 1978), the plaintiff charged that the statutory procedures employed by the State of Connecticut in administering PL 94-142 were inconsistent with federal law. One aspect of the relief requested was for an injunction prohibiting the defendant, Joseph Califano, from dispensing federal funds to the State of Connecticut. The court held that the parents had no standing in that regard. First, it was noted that the Commissioner of Education was the appropriate defendant in this case, and then that funds may be withheld from a particular State only if the Commissioner of Education of the United States, after notice and hearing to the State Board, determines that there has been no substantial compliance with the provisions of the Act by the State.

CHALLENGES TO THE ADEQUACY OF STATE PROCEDURAL GUARANTEES

Prior to a state's receiving approval for Part B federal money, it must submit a plan to the Bureau of the Education of the Handicapped in compliance with 94-142. Part of the plan consists of submitting proposed state due process procedures under 20 U.S.C. § 1415. 20 C.F.R. Part 12a. 131, .500--.514.

The passage of PL 94-142 resulted in the imposition by the federal government of its own concept of due process in the field of the education of handicapped children. Virtually all state education agencies have adopted their own procedures governing hearings and appeals at the school district level and above, concerning all education related matters. For those states that choose to accept Part B money and attempt compliance with 94-142, § 1415 sets out the procedural due process ground rules in the public schools whenever questions involving handicapped children and their parents are involved. The critical feature is that the statute requires a special form of due process to be accorded handicapped children and their parents, totally separate and independent from whatever procedures governing hearings and appeals that may already exist for the school district for all other education-related matters. Section 1415(b)(2) reads as follows:

> Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the state educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child. (Emphasis supplied).

The experience of the States in negotiating with B.E.H. for approval of Part B money under PL 94-142 reveals that the federal concept of an impartial due process hearing under the statute excludes the local school district as a participant in the decision process regarding the asserted rights of handicapped children and their parents. Most school district rules governing hearings and appeals provide that the school board will hold their hearings. This appears to be precluded by § 1415(b)(2).

Frequently, persons protected under the Act are dissatisfied with the due process procedures proposed by the state educational agency and accepted by the B.E.H. in approving funding for the state plan. A private suit may be filed in federal district court naming the school district and the state educational agency as defendants. If the plaintiff has refused to take advantage of the existing procedures in dispute, he or she will be subject to the defense of the failure to exhaust administrative remedies, as required by § 1416 of the statute. Furthermore, approval by B.E.H. of Part B money assumes that the state due process procedures comply with the provisions of the statute. If Plaintiffs were to attempt relief beyond what B.E.H. has approved, then joinder of B.E.H. as an indispensable party under Rule 19 of the Federal Rules of Procedure is probably required. Approval by B.E.H. of the state due process procedures should be prima facie evidence of statutory compliance.

CONSTITUTIONAL CHALLENGES

Plaintiffs may go further and challenge the due process procedures of the state on constitutional grounds under the Fourteenth Amendment of the United States Constitution. In this context, the procedural due process required under the statute probably exceeds the constitutional concept of minimal due process. *Compare*, *Ferguson v. Thomas*, 430 F2d 852 (5th Cir. 1972). In *Campochiaro v. Califano*, *supra*, the state had established an initial hearing by the local Board of Education with a subsequent review by a panel of three persons selected by the State Board of Education. The members of the hearing panel may or may not be employees of the State Department of Education. The court found that both the time lines used (20 days at local level, 90 days at state level), and the current system of holding the hearings violated PL 94-142.

In so holding, the court found that the members of a local board of education were employees of the board, and ordered that the State Commissioner of Education establish an impartial hearing board of three persons to hear this case and render a decision within 45 days. A preliminary injunction was granted in this portion of the action.

In Kettler v. Richardson I.S.D., Civil Action No. 3-78-0892-C (N.D. Tex., August 31, 1978) the court entered an agreed order that an impartial due process hearing be conducted with respect to each grievance presented by the plaintiffs and their children concerning the provision of a free appropriate education within 10 days. The hearing was required to be held before an impartial hearing officer supplied by the State Department of Education. Such officer must be a licensed attorney, not an employee of either defendant. Further, the hearing had to be conducted within the confines of the Richardson I.S.D. at a neutral site and recorded by a certified court reporter. Very soon thereafter, the Texas State Board of Education adopted emergency rules reflecting the provisions of the agreed order.

It is difficult to conceive how the state's federally approved plan for the due process tribunal could be held to be unconstitutionally partial, in light of recent Supreme Court cases. See, Hortonville Joint School Dist. No. 1 v. Hortonville Education Assoc., 426 U.S. 482, 96 S.Ct. 2308 (1976); Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456 (1975); Chamberlin v. Wichita Falls I.S.D., 539 F.2d 566 (5th Cir. 1976). This is true even if the school board has the right to review the impartial hearing officer's decision.

A NON-HANDICAPPED BAKKE?

Where state proposed and federally approved due process procedures under § 1415 of the statute continue to be attacked constitutionally on due process and equal protection grounds, it would appear that the state agencies and school board may justifiably argue that the relief being sought exceeds the traditional boundaries of equal protection for all students. The fundamental concept of "equal protection" means equal treatment for all persons, not special treatment. Plaintiffs cannot claim a denial of equal protection while seeking special accommodations. In fact, at some point the non-handicapped student will be denied equal protection through overemphasis on the welfare of the handicapped student. See, Regents of the Univ. of California v. Bakke, ____ U.S. ____, 98 S.Ct. 2733 (1978); McDonald v. Santa Fe Trails Trans. Co., 427 U.S. 273 (1976).

As a general rule, a state, through its public school system, must undertake to offer a free public education to the children within its jurisdiction without violating the Equal Protection Clause of the Fourteenth Amendment with respect to excluding handicapped children. Mills v. Board of Ed., 348 F.Supp. 866 (D.D.C. 1972); Pennsylvania Assoc. for Retarded Children v. Commonwealth of Pennsylvania, 334 F.Supp. 1257 (E.D. Penn. 1971), 343F.Supp. 279 (E.D. Penn. 1972); Harrison v. Michigan, 350 F.Supp. 846, 848 (E.D. Mich. 1972); LeBanks v. Spears, 60 F.R.P. 135 (E.D. La. 1973); Fialkowski v. Shapp, 405 F.Supp. 946 (E.D. Penn. 1975); Frederick L. v. Thomas, 408 F.Supp. 832 (E.D.Penn.), 419 F.Supp. 960 (E.D. Penn. 1976), affm'd 557 F.2d 373 (3rd Cir. 1977); Hairston v. Drosick, 423 F.Supp. 180 (S.D. W.Va. 1976). Nevertheless, courts have declined to rule that handicapped persons constitute a suspect classification for equal protection purposes. Sherer v. Maier, 457 F.Supp. 1039 (W.D. Mo. 1978); Spencer v. Toussaint, 408 F.Supp. 1067 (E.D. Mich. 1976), 425 F.Supp. 984 (E.D. Mich. 1976); Christensen v. Rice, Civil Action No. 77-C-303, ____F.Supp.____(E.D. Wis., decided August 31, 1978); Guempel v. State, 387 A.2d 399 (N.J. App. 1978); A History of Unequal Treatment; the Qualifications of Handicapped Persons as a "Suspect Class," 15 Santa Clara Lawyer 855 (Sum. 1975). As a result, the rational basis test will be applied in determining whether the procedures and rights given to handicapped persons violate the Equal Protection Clause of the Constitution. Sherer v. Maier, supra.

LIMITS ON FEDERAL COURT JURISDICTION

Two issues arise out of the statutory language which provides for federal court jurisdiction:

(1) Does the child or children seeking relief fall within the definition of "handicapped children" under § 1401(1)?

(2) Does the school district receive federal funds under 94-142 pursuant to the state approved plan? A question arises here whether the receipt by the State Education Agency of Part B money "infects" every school district within the State for jurisdictional purposes of 94-142, even if a particular school district refuses to accept federal Part B money distributed by the state agency. Since 94-142 is basically a contracting statute (with the State Education Agency being the central contracting agent for the State and its school districts), it appears doubtful that a particular school district could refuse to accept federal money through the state agency and escape responsibility under 94-142. No cases have been decided on this question.

In recognition of the unique condition of each handicapped individual, at least one court has refused to certify as a class a group of handicapped and elderly persons on the basis that such a class is "so nebulous and so diverse as to defy attempts to ascertain its limits". Webb v. Miami Valley Regional Transit Authority, No. C-3-75-67 (S.D. Ohio, complaint dism'd, Jan. 19, 1976); see Wright, Equal Treatment of the Handicapped by Federal Contractors, 26 Emory L.J. 66, 98 n. 198 (1977). In Rogers v. Frito Lay Inc., 433 F.Supp. 200 (N.D. Tex. 1977), the court refused to imply a private cause of action under 29 U.S.C. § 793, stating the following:

> There is no readily identifiable and homogeneous class of handicapped persons.

Handicapped individuals are a heterogeneous class who manifest individually unique disabilities which frequently are not immutable.

It appears doubtful that 94-142 contemplates class relief being given under the unique statutory framework that contemplates an individualized impartial due process hearing to determine the individual's particular special educational needs. Nevertheless, Judge Bartels has granted what amounts to classwide relief to the New York State Assoc. for Retarded Children, Inc., in a recently decided case. New York State Assoc. for Retarded Children, Inc. v. Carey, Civil Action No. C-72-356, ____F.Supp.____ (E.D.N.Y. decided Feb. 28, 1978). The court held that the Board of Education of the City of New York's proposed plan to segregate within public schools all mentally retarded children epidemialogically classified as hepatitus carriers would violate their rights. Initially it would violate a consent judgment which required the Board to place the children in the community and the least restrictive environment and arrange programs for them so that they could develop their potential and live as normal a life as possible. The court held that the plan would also violate PL 94-142 and the Rehabilitation Act of 1973.

In Mattie T. v. Holladay, 26 Mississippi school children filed a class action on behalf of all school aged children in the state who were handicapped or regarded by their schools as handicapped, challenging (a) denial of the special education services to handicapped children who were either excluded from school entirely, placed in inappropriate special education programs or neglected in regular education classes; (b) provision of segregated and isolated special education programs; (c) use of racially and culturally discriminatory procedures in identification, evaluation and placement of handicapped or allegedly handicapped children; and (d) the absence of procedural safeguards on decisions of school officials.

On February 22, 1979 the U.S.District Court signed a consent decree approving settlement of the four year old special education case challenging the failure of state and local education officials to enforce provisions of 94-142. The consent decree approved by the court requires the state to adhere to the letter and spirit of the federal handicapped law through a compliance plan that ensures a state child-find program, racially and culturally nondiscriminatory testing, procedural safeguards such as prior notice of placement and impartial due process hearings, and placement of handicapped children in the least restrictive environment possible (i.e., with nonhandicapped students whenever possible).

CONSTITUTIONAL ISSUES YET TO BE RESOLVED

Does 94-142 and its implementing regulations infringe upon the state's right to structure its traditional state functions? Cf. National League of Cities v. Usery, 426 U.S. 833 (1976). In this regard, many states have statutes specifically prohibiting discrimination against handicapped persons. TEX.REV.CIV.STAT.ANN. art. 4419e(f) (1975). Of course, most state legislatures had been funding special education programs long before the passage of PL 94-142 and its statutory predecessors. These state statutes have a common link with the states' traditional history and involvement in the education of all children.

Is the statute vulnerable to a reverse discrimination attack by non-handicapped students alleging their equal protection rights are violated due to the special treatment afforded to the handicapped? There is no question that at some point the courts will be required to balance the interests of the handicapped person against the interest of the school in allocating its scarce resources and against the interest of the non-handicapped students. At some point the equal protection rights of the non-handicapped outweigh the right of an individual to a free appropriate education, under traditional equal protection analysis. The tension between 94-142 and the Equal Protection Clause is highlighted by a similar conflict between Title VII's prohibition against religious discrimination and the Establishment Clause of the First Amendment. In two cases, federal courts have held that § 701(j) of Title VII provides that employers must make reasonable accommodations to the religious beliefs and practices of employees, but that accommodation requirement causes the Government to be excessively entangled with religion, in violation of the Establishment Clause of the First Amendment to the Constitution. Charles Gavin v. Peoples Natural Gas Co., ____F.Supp.____(D.C.Penn 1979); Yott v. North American Rockwell Co., 428 F.Supp. 763 (D.C. Cal. 1978).

Similarly, the requirement that a school district provide a free appropriate education in the least restrictive environment to handicapped children may place PL 94-142 in violation of the equal protection rights of non-handicapped students.

PRIVATE CAUSE OF ACTION UNDER SECTION 504

A private cause of action to private litigants is not specifically provided in the statute. 29 U.S.C. § 794 as amended in November, 1978 reads as follows:

> No otherwise qualified handicapped individual in the United States, as defined in § 706(6) of this title, shall solely by reason of his handicap, be excluded from the participation, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *or under any program or activity conducted by any Executive Agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services and Developmental Disability Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulations may take effect no earlier than the 30th day after the date on which such regulation is so submitted to such committees*.
>
> *Section 505(a)(2). The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or provider of such assistance under § 504 of this Act*.
>
> *Section 505(b). In any action or proceeding to enforce or charge a violation of a provision of this Title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys fee as part of the costs*.
>
> (Emphasis added indicates amendment to section by the Rehabilitation, Comprehensive Services and Development Disability Amendments of 1978, PL 95-602, § 119 92 Stat. 2982 (1978) ("The 1978 Amendments").)

By their language, the 1978 Amendments do little to clarify the question of whether a private cause of action exists under § 504. Certainly Congress knows how to expressly create a private cause of action in the handicap area, as is seen by its lack of temerity in providing such under PL 94-142 (20 U.S.C. § 1416). The amendment to § 504 itself does nothing to confer a private cause of action. It merely clarifies the rulemaking authority of federal agencies under § 504.

The new provisions contained in § 505 likewise do little to clarify the jurisdictional question. Section 505(a)(2) restates in the statute what already exists in the regulation. 25 C.F.R. Part 84.461 of the § 504 regulations state that the procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to this Part. The net result is that Congress means what the regulations already said they meant. This begs the question of what the Congress meant in the first place. Under this analysis, reference to the cases under Title VI must be made to determine if a private cause of action exists under that statute. Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (hereafter Title VI), states as follows:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

In a sweeping recent decision, the Supreme Court decided that private parties have an implied cause of action under Title IX, which prohibits sex discrimination by recipients of federal financial assistance. Cannon v. University of Chicago, ____U.S.____, 99 S.Ct. 1946 (1979). In surprising dicta in the decision, the majority allowed that the remedy under Title IX was the same as that under Title VI, which the Court assumed had already been decided as implying a private right of action. 99 S.Ct. at 1957-58.

WHAT DID CONGRESS INTEND?

The final 1978 amendment which might indicate Congressional intent to confer a private cause of action is § 505(b) which provides as follows:

> In any action or proceeding to enforce or charge a violation of a provision of this Title, the court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

Plaintiffs will argue that because beneficiaries of federally funded programs are the only private parties who would likely bring proceedings "to enforce or charge a violation of this Title . . .", a provision for court-ordered attorney's fees only makes sense if Congress intended § 504 to afford a private right of action. This may be true, however, this provision for attorney's fees could be construed to apply only to a suit in federal district court to review the decision of the federal administrative agency in charge of enforcing § 504 (H.E.W.) based upon the substantial evidence rule.

In Lloyd v. Regional Transportational Authority, 548 F.2d 1277 (7th Cir. 1977) the 7th Circuit implied a cause of action under § 504 prior to the issuance of federal regulations implementing the new statute. In footnote 29, page 1286, the Court noted that if there was a meaningful administrative enforcement mechanism, the private cause of action under § 504 should be limited to a posterioi judicial review. It is arguable, therefore, that Congress intended private parties to recover attorney's fees in a court proceeding based upon a substantial evidence review of the administrative decision. Furthermore, the attorney's fee provision of § 505(b) would also apply to a judicial remedy through a private action of a fraud recipient threatened with termination. See, e.g., Mandel v. Dept. of Health, Education and Welfare, 411 F.Supp. 542 (D. Md. 1976), affm'd by an equally divided court sub nom., Mayor and City Council of Baltimore v. Mathews, 571 F.2d 1273 (4th Cir. 1978) (Title VI).

The seminal case most frequently relied upon for the proposition that there is a private cause of action under § 504 is Lloyd v. Regional Transport Authority, 548 F.2d 1277 (7th Cir. 1977). That case dealt not only with § 504 but also with the provisions contained in the Urban Mass Transportation Act, as did United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977), which relied on Lloyd and which also has been frequently cited as espousing the theory that there is a private cause of action under § 504. Both of these cases arose prior to the promulgation of final regulations by H.E.W. designed to implement § 504. The regulations were issued on May 4, 1977. 45 C.F.R. § 84. The lack of federal administrative regulations was the critically important fact to the 7th Circuit's decision in Lloyd to imply a private cause of action temporarily under § 504. 548 F.2d at 1286, Fn. 29.

Due to the subsequent promulgation of comprehensive consolidated regulations by H.E.W., it is arguable that Lloyd should by its own terms have no stare decisis effort. Nevertheless, other circuit and district courts continue to rely on the Lloyd decision as authority for the implication of a private cause of action under § 504. Kampmeier v. Nyquist, 553 F2d 296, 299 (2nd Cir. 1977); Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978), rev'd on other grounds, 47 U.S.L.W. 4689 (decided June 11, 1979): National Association for the Advancement of Colored People v. Medical Center, Inc., ____F.2d____(3rd Cir. 1979) (decided June 4, 1979). In the Davis v. Southeastern Community College case, the Supreme Court denied relief under § 504 without deciding the jurisdictional question which was squarely before it.

ISSUES OF JURISDICTION

Some decisions have granted relief under § 504 without deciding the jurisdictional issue. Leary v. Crapsey, 566 F.2d 863 (2nd Cir. 1977) (defendants conceded the jurisdictional issue); Bartels v. Biernot, 405 F.Supp. 1012, 1015 (E.D. Wis. 1975); Duran v. City of Tampa, 451 F.Supp. 951 (M.D. Fla. 1978). In Coleman v. Darden, 13 E.P.D. 11502 (D.C. Colo. 1976), affm'd on other grounds, 595 F.2d 533 (10th Cir. 1979), the district court held that § 504 did not imply a private cause of action. The 10th Circuit affirmed the entry of a summary judgment on behalf of the defendants without deciding the jurisdictional issue. After noting that every Circuit Court of Appeals which has addressed the issue has held that a private cause of action can be implied from the statute against the proper defendants, the court stated the following:

> Assuming that such a cause of action might be implied under certain circumstances, we do not believe that a federal agency can be considered a 'program or activity receiving Federal financial assistance' under § 794. 595 F.2d at 538.

Some courts have avoided the threshold jurisdictional issue posed by § 504 by granting relief on other grounds, such as due process. Gurmankin v. Constanzo, 556 F.2d 184 (3rd Cir. 1977); Hairston v. Drosick, 423 F.Supp. 180 (S.D. W. Va. 1976). One court decided the § 504 jurisdictional issue in favor of plaintiff by relying on two non-§ 504 cases. Sites v. McKenzie, 423 F.Supp. 1190 (N.D. W. Va. 1976) (citing Gurmankin v. Constanzo, supra, and Hairston v. Drosick, supra.) In three cases, the courts, while not addressing the jurisdictional issue presented by § 504, held that the defendants had not violated the provisions of the Act. Snowden v. Birmingham--Jefferson Cty. Transit Authority, 407 F.Supp. 394 (N.D. Ala. 1975), affm'd per curiam, 551 F.2d 862 (5th Cir. 1977); Vanko v. Finley, 440 F.Supp. 656 (N.D. Ohio 1977); Carmie v. Metropolitan St. Louis Sewer District, ____F.Supp.____(E.D. Mo., decided March 21, 1979).

Numerous district court decisions have implied a private cause of action under § 504. Davis v. Bucher, 451 F.Supp.791 (E.D. Penn. 1978) (summary judgment for plaintiff); Michigan Paralyzed Veterans of America v. Coleman, 451 F.Supp. 7 (E.D. Mich. 1977); Drennon v. Philadelphia General Hospital, 428 F.Supp. 809 (E.D. Penn. 1977) (action against defendants stayed pending exhaustion of administrative remedies); Boxall v. Sequoia Union High School Dist., Civil Action No. C-78-1588,____F.Supp.____(N.D. Calif. 1979), decided Jan. 9, 1979; Whitaker v. Bd. of Higher Education of City of New York, Civil Action No. 77-C-2258,____F.Supp.____(E.D.N.Y. 1978), decided Oct. 17, 1978; Howard S. v. Friendswood I.S.D.,____F.Supp.____(S.D.Tex. 1978); Walter Camenish v. Univ. of Texas, Civil Action A-78-CA-061,____F.Supp. ____(W.D. Texas 1978), decided May 17, 1978; Barnes v. Converse College

436 F.Supp. 635 (D.S.C. 1977) (the court ultimately declined to take jurisdiction until federal administration remedies had been exhausted). See, Barnes v. Converse College, Civil Action No. 77-116, ___F.Supp. ___(D.S.C. May 8, 1978).

WHO CAN SUE?

In determining whether a private cause of action exists under a federal statute not expressly conferring one, the court and litigants must refer to the Supreme Court decision in Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080 (1975). This decision provides a four pronged test: (1) is the plaintiff "one of the class for whose especial benefit the statute was enacted"-- that is, does the statute create a federal right in favor of the plaintiff; (2) is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) is the cause of action one traditionally relegated to state law, in an area basically the concern States, so that it would be inappropriate to infer a cause of action based solely on federal law. As a general rule, the Supreme Court has been very stingy in implying a private cause of action from a federal statute. See, Santa Clara Pueblo v. Martinez, 436 U.S.___, 98 S.Ct. 1670 (1978) (refusing to imply a private right of action to Indians under Title I, the Indian Civil Rights Act); Cort v. Ash, supra, (refusing to imply a private right of action by a shareholder under 18 U.S.C. § 610 forbidding corporate contributions to Presidential campaigns); Securities Investor Protection Corp. v. Babour, 421 U.S. 412 (1975); (refusing to imply a private right of action by an investor under the Securities Investor Protection Act of 1970, 15 U.S.C. § 78aaa, et seq.); National Railroad Passenger Corp. (Amtrak) v. National Assoc. of Railroad Passengers, 414 U.S. 453 (1974) (refusing to imply a private right of action to enforce Rail Passenger Service Act of 1970).

Since the Supreme Court already has squarely implied a private right of action under Titles VI and IX in Cannon v. Univ. of Chicago, supra, it is difficult to imagine that they might conclude differently about § 504, given the statutory similarity of the three laws. The only reason to pause, however, is the fact that the Court avoided the jurisdictional issue squarely before it in Southeastern Community College v. Davis, supra and gave a stern warning to Congress in Cannon to expressly provide judicial remedies in statutes in the future since Title IX is an "atypical" case. 99 S.Ct. at 1967.

STANDING IN EMPLOYMENT CASES

One decision that will significantly limit the jurisdictional scope of § 504 in private litigation, is the 4th Circuit's decision in Trageser v. Libbie Rehabilitation 590 F.2d 87 (4th Cir. 1978), cert. denied. In Trageser, the 4th Circuit apparently ignored its previous decision in Davis v. Southeastern Community College by holding that a private right of action under § 504 is generally unavailable in cases alleging employment discrimination. The Trageser case involved a registered nurse who brought suit under § 504 claiming that the termination of her employment was due solely to a hereditary and progressive disorder that had affected her sight. The court of appeals, in affirming the district court's dismissal of the action, held that "/ a/ private action under § 504 to redress employment discrimination . . . may not be maintained unless a primary objective of the federal financial assistance is to provide employment." 590 F.2d at 89. The earlier opinion in Davis was seemingly ignored, the only distinguishing feature being that Davis was not an employment case. The major reliance with the 4th Circuit in Trageser, however, was placed on the 1978 Amendments and their effect on a plaintiff's remedy under § 504.

Trageser directed its attention to § 120(a) of the 1978 Amendments and specifically to the new § 505(a)(2) previously discussed regarding the remedies of Title VI being available to aggrieved parties under § 504. The court correctly reasoned that a plaintiff such as Ms. Trageser must seek redress under Title VI remedies and procedures. But, the court interpreted § 604 of the Civil Rights Act of 1964 as not only expressly curtailing the authority of federal departments and agencies to bring a private suit against any employee, employment agency, or labor organization but as not allowing suits as well. The court held that Title VI does not provide a judicial remedy for employment discrimination by institutions receiving federal funds unless:

(1) providing employment is a primary objective of federal aid, or

(2) discrimination in employment necessarily causes discrimination against the primary beneficiaries of federal aid. Slip opinion at 5.

On the other hand, the 1978 Amendments, as the Trageser opinion emphasized, make available to federal employees who complain of handicap discrimination in violation of § 501 of the Act, 29 U.S.C. § 791, the remedies, procedures and rights under Title VII of the Civil Rights Act of 1964, including a private right of action. As the court aptly observed:

> Congress also could have utilized Title VII to define the rights and remedies of persons in Trageser's position who must rely on § 504. Instead, for employees of private institutions receiving federal financial aid, § 120(a) of the 1970 Amendments make available only the remedies, procedures, and rights of Title VI, which, as we have noted, contains the restriction of § 604. The distinction that § 120(a) draws between the relief available from federal employees and that of employees of private institutions receiving federal assistance could not have been inadvertant. Slip opinion at 6.

In fact, under the reasoning of *Trageser*, the Congress has deliberately bestowed a private right of action on federal employees aggrieved under § 501 of the Act and disallowed such a private action to employees of private institutions and programs receiving federal financial assistance. This omission is significant; however, this line of reasoning was rejected by the Supreme Court in *Cannon*.

The *Trageser* decision underlines the growing theory of "programmatic liability" which is beginning to appear in cases where private parties seek to enforce rights under federal statutes which prohibit discrimination by institutions and governmental units receiving federal financial assistance. *Board of Public Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969); *Bob Jones Univ. v. Johnson*, 396 F.Supp. 597 (D.S.C. 1974), *affm'd per curiam*, 529 F.2d 514 (4th Cir. 1975). This is sometimes referred to as the "pin-point proviso". *Romeo Community Schools v. H.E.W.*, 438 F.Supp. 1021 (E.D. Mich. 1977), *Affm'd*, F.2d____(6th Cir., decided June 20, 1979). *Brunswick School Bd. v. Califano*, 449 F.Supp. 866 (D. Main, 1978). The counter argument to the pin-point proviso theory is the "infection theory" which has been picked up from dicta in *Board of Public Instruction v. Finch*, *supra* at 1075. The infection theory basically means that a private cause of action is maintainable against a recipient of federal financial assistance, even if the federal money does not touch the area or program alleged to be discriminatory. *See*, *Flanagan v. President and Directors of Georgetown College*, 417 F.Supp. 377 (D.D.C. 1975).

Should the programmatic liability theory of *Trageser* prevail, school officials might seriously consider accepting federal money that is not specifically earmarked for employment purposes. Furthermore, negotiations or applications for federal funds might specifically avoid non-categorical grants in funding so as to avoid the application of the infection theory.

EXHAUSTION OF FEDERAL ADMINISTRATIVE REMEDIES

Numerous cases have held that before a party may bring a private cause of action in a court of competent jurisdiction, he must first exhaust his administrative remedies with H.E.W. *Sherer v. Maier*, 457 F.Supp. 1039 (W.D. Mo. 1978); *Drennon v. Philadelphia General Hospital*, 428 F.Supp. 809 (E.D. Penn. 1977); *Doe v. New York Univ.*, 422 F.Supp. 522 (S.D.N.Y. 1978); *Crawford v. Univ. of North Carolina*, 440 F.Supp. 1047 (M.D.N.C. 1977); *Barnes V. Converse College*, ____F.Supp.____(D.S.C. decided March 31, 1978 and May 8, 1978); *NAACP v. Wilmington*, 426 F.Supp. 919 (D.C. Del. 1977). On the other hand, numerous courts have decided the question without requiring administrative exhaustion. *Whitaker v. Bd. of Higher Education*, ____F. Supp.____(E.D. N.Y., decided Oct. 17, 1978); *Camenisch v. Univ. of Texas*, Civil Action No. A-78-CA-061, ____F.Supp.____(W.D. Tex. decided May 17, 1978); *see also* other cases cited previously where the court found a private cause of action was implied under § 504.

Again, the big problem seems to be determining legislative intent. Section 504 is silent in this respect. The regulations promulgated pursuant to § 504 clearly contemplate federal administrative action by the Office of Civil Rights (OCR) prior to any private action. 42 Fed. Reg. 22696 (May 4, 1977). Nevertheless, the exhaustion requirement might be waived if the administrative remedy does not appear to be meaningful, due to administrative backlogs. *See*, *Doe v. New York Univ.*, *supra*. On the other hand the administrative backlog argument was specifically rejected in *Barnes v. Converse College*, *supra*.

As a corollary to the exhaustion requirement, the doctrine of primary jurisdiction may be invoked to stay the proceedings in district court pending administrative exhaustion with H.E.W.'s Director of the Office of Civil Rights. H.E.W. has primary jurisdiction over the merits of private parties' claims due to the need for orderly and sensible coordination of the work of agencies and of courts. *Barnes v. Converse College*, ____F.Supp.____(D.S.C. decided May 8, 1978); *Stubbs v. Kline*, Civil Action No. 78-431 ____F.Supp.____ (W.D. Penn., decided Dec. 28, 1978); *Drennon v. Philadelphia General Hospital*, 428 F.Supp. 809 (E.D. Penn. 1977).

Nevertheless, courts have issued preliminary injunctions pending exhaustion of the administrative processes. *Camenisch v. Univ. of Texas*, *supra*; *Crawford v. Univ. of North Carolina*, *supra*. Since the provisions of § 504 do not contemplate an independent evaluation through impartial due process hearing of the needs of the handicapped individual, it would appear that the primary jurisdiction and administrative exhaustion requirements should have greater force under §504 since the agency has the peculiar expertise and competence to make determinations of whether a person is "handicapped", "otherwise qualified" and a "recipient of federal financial assistance."

ENFORCEABILITY OF § 504 UNDER 42 U.S.C. § 1983

Even if a private cause of action cannot be implied under § 504, the rights conferred to private parties (if any) may still be enforceable under the general civil rights statute, 42 U.S.C. § 1983. Howard S. Friendswood I.S.D., ___F.Supp.___(S.D. Tex. 1978). See, e.g., De La Cruz v. Tormey, 582 F.2d 45, 60 (1978) (no private cause of action under Title IX, however the rights under that statute are enforceable under § 1983); Grossman v. Texas Tech. Univ., ___F.Supp.___(W.D. Tex. 1978). Assuming that this approach is correct, the quality and quantity of relief available to plaintiffs becomes more limited and harder to get. Plaintiff must show intent to discriminate under § 1983. Washington v. Davis, 426 U.S. 229 (1976). If the action is against the State, plaintiffs are not entitled to monetary damages. Quern v. Jordan, 47 U.S.L.W. 4241 (decided March 5, 1979). Therefore, only prospective injunctive relief would be available, absent a showing of bad faith against state officials who were sued in their individual capacities. Wood v. Strickland, 420 U.S. 308 (1975).

It could be argued, however, that the relief afforded by § 504 to private individuals is limited to the relief that can be obtained at the administrative level from H.E.W. See, e.g., Mathews v. Eldridge, 424 U.S. 319 (1976).

UNRESOLVED CONSTITUTIONAL QUESTIONS

(1) How much federal assistance does a recipient have to receive in order to trigger the provisions of § 504? Will one dollar make him subject to the discriminatory provisions of § 504? In this regard, do the regulations issued pursuant to § 504 exceed the scope of the statute by including indirect benefits in the definition of a recipient of federal financial assistance?

(2) Does § 504 violate the State's Tenth Amendment Right to structure its traditional functions? National League of Cities v. Usery, 426 U.S. 833 (1976).

(3) Do the regulations issued pursuant to § 504 exceed the scope of the statute so as to deny non-handicapped persons their rights to equal protection under the Fourteenth Amendment?

(4) Does a non-handicapped person who feels discriminated against by the relief given to handicapped persons under § 504 have standing to seek judicial relief in court for reverse discrimination under the Equal Protection Clause and/or § 1983?

(5) Are the regulations issued pursuant to § 504 unconstitutional or overboard in their definition of the term "handicapped", "otherwise qualified"?

SUMMARY

The foregoing discussion, while by no means exhaustive, attempts to organize many of the jurisdictional and procedural questions arising under the new federal handicap laws. The statutes and regulations are very new and the court decisions have only recently started focusing on the very difficult questions involved in this area. Congress has moved with extreme boldness with respect to the rights of handicapped children in public schools, as is seen by the comprehensiveness of PL 94-142.

In the area of employment of handicapped persons, however, Congress has shown great reluctance to clearly define its intent with respect to private court actions. As a result, the courts have been left to fill in the gap, and the decisions are frequently in confict.

The following two articles provide a very informative analysis of the *rights* of handicapped persons under § 504. Brooks, *Section 504 of the Rehabilitation Act of 1973 and the Private College*; *Barnes v. Converse College*, 29 Mercer L.Rev. 745 (1978); Note, *Rehabilitating the Rehabilitation Act of 1973*; 58 Boston Univ. L.Rev. 247 (1978). For a good analysis of similar rights under PL 94-142, see 92 Harvard L.Rev. 1103 (March 1979).

TITLE VII - AN OVERVIEW

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In recent years there has been tremendous growth in the volume of employment discrimination litigation, particularly in the case of public employers such as boards of education. An increasing portion of this litigation involves complaints brought under 42 U.S.C. Section 2000e-1 *et seq.*, commonly referred to as "Title VII," which became applicable to boards of education on March 24, 1972. Since Title VII litigation involves a combination of both administrative and judicial proceedings, there are a number of procedural steps and pitfalls which can make a crucial difference to the defense of an employment discrimination claim. The purpose of this article is to outline the general procedure and to point out some of those critical phases which merit special attention by defense counsel.

THE TITLE VII PROCEDURE

The initial phase of any Title VII action is the filing of a complaint with the Equal Employment Opportunities Commission (EEOC). This complaint, in writing and under oath, triggers an investigation by the EEOC. The complaint must allege an act which constitutes unlawful discrimination under the act; that is, discrimination based upon race, color, religion, sex, or national origin.[1] The discriminatory action must have taken place, in most cases, within 180 days of the filing of the complaint.[2] In cases where there has been a charge filed under a state or local ordinance, that limit may be extended up to 300 days from the time of the event and the EEOC is required to defer to the local agency for a period of up to 60 days.[3]

Notice of an EEOC charge is provided to the employer and should be given within 10 days of the filing of the charge. Upon the filing of a charge, the EEOC is required to conduct an investigation which can result in an administrative determination that there either is, or is not, reasonable cause to believe that the charge is true. If reasonable cause is not found, the charge is dismissed; if reasonable cause is found, the EEOC is then required to attempt to eliminate the discrimination by informal methods.[4] The investigation stage of the proceedings is subject to a 180-day time limit and if the commission has not conciliated the dispute or brought suit within that time, the complaining party may then receive what is known as a "right to sue letter."[5] This letter provides the basis for bringing a private action against the employer. That action must be brought within 90 days of the "right to sue" letter.

THE LITIGATION PHASE - TIME LIMITS

The litigation of a Title VII claim may be commenced in two ways; suit by the individual or suit by the commission. In the case of suits by individual plaintiffs, the courts have tended to liberally construe the procedural requirements of Title VII to the end that the plaintiff is not prejudiced by the failure of the EEOC to follow all of the required administrative steps. The two jurisdictional elements are the timely filing of a charge with the EEOC and receipt of the right to sue letter.[6] Recently, the Supreme Court has re-emphasized the importance of the 180-day time limit for the filing of a charge with the EEOC. In United Airlines, Inc. v. Evans,[7] the plaintiff had been forced to resign in 1968 under the employer's rule prohibiting married flight attendants. That rule was later determined to be in violation of Title VII, though the plaintiff was not a party to that case and did not initiate any proceedings before the EEOC at that time. Upon her reemployment, she was not given credit for any seniority accrued under her prior service. She then brought a Title VII complaint alleging a continuing violation of her rights because of her lower seniority. The Supreme Court denied her claim, in part for the reason that she had not shown a present violation of Title VII and had not sought any relief under the previous "no-marriage" rule.

The Evans decision indicates that the 180-day time limit for filing an EEOC complaint is mandatory and that the courts will probably be less favorable to claims which fall outside that time limit than they have been in the past. A number of lower federal courts have previously avoided the 180-day limit by finding that there was a "continuing violation" of Title VII, even though the actions which gave rise to that violation had never been challenged within the required time.

In addition to suits by individual plaintiffs, the EEOC may also both initiate charges of unlawful discrimination under the act and commence suit. In the case of local government agencies, such as boards of education, the Attorney General, rather than the commission, has the authority to commence suit.[8] In the case of suits by the commission (or the Attorney General), the courts have been much stricter in requiring that the administrative steps required of the EEOC be followed. Thus, some courts have held that the failure of the EEOC to comply with its own investigative procedures,[9] the failure to make a determination of reasonable cause,[10] or the failure to attempt conciliation[11] will bar suit by the EEOC. Presumably, these same defects would also bar suit by the Attorney General as well. On the other hand, once a timely charge has been filed, there is apparently no time limit on the right of the commission (or, presumably, the Attorney General) to commence suit in its own name.[12]

SCOPE OF THE TITLE VII COMPLAINT

Although the decisions are far from unanimous, the majority of cases hold that the complaint in a Title VII action is limited to the same general type of discrimination claimed in the EEOC charge. For example, a charge alleging sex discrimination could not serve as the basis for litigation raising the issue of religious discrimination.[13] While the courts have recognized that the initial charges are generally not prepared by lawyers and should be liberally construed, they generally draw the line in the case of entirely unrelated charges of which the employer did not have notice, which were not included in, or which could not reasonably be expected to grow out of the EEOC investigation.

SCOPE OF AVAILABLE RELIEF

The question of whether or not claims for compensatory and punitive damages may properly be raised in a Title VII action is one which has sharply divided the federal circuit courts. The statutes specifically limit the relief available under Title VII to injunctive relief, such as reinstatement with or without back pay, and other "equitable relief" as the court deems appropriate.[14] In the case of back pay, the award is specifically limited to a period of two years prior to the filing of the charge with the commission.

Although the courts have not hesitated to fashion equitable remedies in cases where intentional unlawful discrimination is found to exist, they have been much more reluctant to permit Title VII to become a vehicle for damage claims. Thus, several circuits have held that neither punitive nor compensatory damages are proper in a Title VII action.[15]

In keeping with the view that Title VII cases are strictly equitable in nature, most of the courts considering the issue have also held that there is no right to jury trial.[16]

Our office was recently involved in the appeal of an Ohio district court decision in which the trial court found that the board of education had intentionally discriminated against a female teacher by assigning her to the less desirable of two gymnasia (there were only two in the district). Although there was no evidence of any monetary loss to the plaintiff, who had since voluntarily resigned, the court nonetheless awarded her compensatory damages in the amount of $1,000 per year for six years. On appeal, the Sixth Circuit reversed, holding that the available relief under Title VII does not include compensatory damages.[17]

One interesting aspect of this decision was the circuit court's rejection of the argument that Title VII was limited to discrimination in the economic benefits of employment as opposed to working conditions. Thus, at least in that circuit, a showing by one female physical education teacher that her gymnasium was inferior to that used by the other (male) teacher was apparently enough to establish a prima facie case of discrimination.

JOINDER OF NON-TITLE VII CLAIMS

It is not uncommon for persons bringing Title VII claims against boards of education to join other claims, particularly claims alleging violations of Constitutional rights under 42 U.S.C. Section 1983. The United States Supreme Court has recently held that boards of education are now considered "persons" for the purpose of Section 1983 claims, and it is clear that they are also persons who may be employers for purposes of Title VII claims.[18] Since Section 1983 claims are not limited to equitable relief and do not involve any administrative review prior to bringing suit, it is at least arguable that the joinder of these claims in one lawsuit defeats the intent of Congress in enacting Title VII. . . because plaintiffs have no real incentive to seek resolution of their claims at the administrative level. Although a few courts have indicated that such a joinder is not proper, the issue does not appear to have received a great deal of attention.[19]

BURDEN OF PROOF

In cases alleging discrimination by reason of disparate treatment of persons by reason of race, color, sex, national origin, or religion, the courts have developed what is basically a three stage formula for the presentation of evidence. The first stage involves plaintiff's burden to establish a prima facie case; that is, to show that actions were taken "...(f)rom which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were, based on a discriminatory criterion illegal under the act."[20] Once this initial burden is established, the employer must then go forward by articulating "some legitimate non-discriminatory reason for its action." The plaintiff may then rebut the reasons offered by showing that they are, "a sham" or a mere pretext for discrimination.

The Supreme Court has now made it clear that the showing of a prima facie case of discrimination does not, in and of itself, require a finding of liability. A prima facie case does shift the burden of going forward to the employer. That burden, however, is not one of proving non-discrimination. The court has recently made it clear that employers need only establish that the actions taken were based on legitimate, non-discriminatory reasons. In this respect it is interesting to note that the Supreme Court has very recently taken pains to reject the view that an employer must adjust his business practices in such a way as to maximize the hiring of minorities. As the court noted,

> "Title VII forbids him (the employer) from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees."
>
> Furnco Construction Co. v. Waters, 21

Although the "legitimate reason test" recently clarified by the Supreme Court is a much lighter burden than that imposed by a number of earlier lower federal decisions, the court made it clear that the plaintiff still has the opportunity to show that the reasons advanced are only a pretext for discrimination.[22] If, for example, the plaintiff can show that the reasons advanced for his treatment were not applied to non-minority employees in the same situation, he would probably prevail in any event.

STATISTICAL EVIDENCE

The use of statistical evidence, both by plaintiffs and defendants in Title VII cases has become an accepted (and often abused) practice. Since boards of education are relative newcomers to the Title VII arena, there are some special considerations which apply to this type of evidence. Keep in mind that most courts have refused to apply the 1972 amendments which made boards of education subject to Title VII retroactively. While it may be possible to compile statistical data from year one to the present and point to an inference of employment discrimination, the relevant period is from March 24, 1972 to the present.[23] Regardless of the composition of the work force prior to the Act, there can be no liability if all employment decisions after the date of the amendments were made on a nondiscriminatory basis. It should also be noted that the proper basis for comparison of your teaching staff is neither the student population nor the labor force in general, but with the qualified school teacher population in the relevant labor market.[24]

NEGOTIATION AND SETTLEMENT: THE REVERSE DISCRIMINATION PROBLEM

Regardless of whether your Title VII litigation is brought by the Attorney General or by a private plaintiff (or both), the prospect of a negotiated settlement always remains open. Because of the unique nature of these proceedings, however, there are two particularly troublesome aspects of settlement which should be considered. The first of these is the problem of exposure to additional litigation (reverse discrimination claims) by reason of negotiated "affirmative action" plans. The second is the problem of attorney fees.

At the present time there is a great deal of uncertainty as to the rights of non-minorities who are precluded from job opportunities because of preference given to minorities. These preferences can arise from self-imposed affirmative action plans, consent decrees, or in some cases, from court-imposed plans. A number of cases have held that these plans can give rise to a cause of action on the part of the non-minority.[25]

At the present time the case of Weber v. Kaiser Aluminum and Chemical Corp. is pending before the United States Supreme Court. That case involves a challenge to a negotiated "affirmative action" plan between the employer and the union which gave preference to minority employees. It is particularly significant that the plan before the court was private, as opposed to a judicially imposed remedy to alleviate the effects of past discrimination. On that basis, the Fifth Circuit Court of Appeals affirmed the trial court's finding of employment discrimination.[26] Until the law in this area is clarified, it would appear that virtually any self-imposed affirmative action plan has potential for a lawsuit by a non-minority applicant or employee who is placed at a disadvantage.

The same problem can arise with the use of consent decrees. Those courts which have denied reverse discrimination claims have, for the most part, done so on the grounds that the plan being attacked was imposed by the court after a finding of past discrimination and a finding that the plan was necessary to alleviate the effects of that discrimination. At least one court has questioned whether an affirmative action plan imposed as the result of a voluntary consent decree was sufficient to satisfy that test.[27]

ATTORNEY FEES

The second area of potential problems in settlement is that of attorney fees. Attorney fees are specifically available to the prevailing party in Title VII action.[28] (42 U.S.C. Section 2000e-5(k)).

In order to be a "prevailing party" for this purpose, it is fairly well established that a plaintiff need not prevail as to all issues in the case and need not necessarily recover any monetary benefit for his client.[29] The courts have now taken the view that attorney fees will be awarded as a matter of course in Title VII cases unless there is good reason not to.[30]

On the other hand, the same standard has not been applied to prevailing defendants. At the present time, defendants are entitled to an award of attorney fees only where the court determines that the suit was "...frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."[31] It is also clear that the doctrine of governmental immunity will neither shield a board of education from Title VII liability nor from an award of attorney fees.[32]

In view of the broad scope of attorney fee awards to plaintiffs, any settlement should clearly address the issue of attorney fees and indicate whether or not fees are to be paid. If attorney fees are not paid, the settlement entry should indicate that the request is withdrawn.

SUMMARY

Title VII is today one of the fastest growing and most complex fields of litigation in the country. The law as to many critical issues is being refined and modified almost daily. Many of these issues are yet to be resolved by the Supreme Court, or the lower federal courts. Despite the uncertainties, this field represents a tremendous challenge to the school lawyer. The challenge involves not only the successful defense of litigation but also that of careful guidance to avoid litigation wherever possible. Though a difficult task, it can be attained, and public education will be benefitted by our efforts.

FOOTNOTES

(All statutory references are to 42 U.S.C.)

1. 2000e-2
2. 2000e-5(e)
3. 2000e-5(c), (d), (e)
4. 2000e-5(b)
5. 2000e-5(f)
6. *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973)
7. *United Air Lines v. Evans*, 97 S.Ct. 1885 (1977)
8. 2000e-5(f)
9. *E.E.O.C. v. Western Electric Co.*, 383 F. Supp. 787 (D.Md. 1974)
   E.E.O.C. v. Allegheny Airlines, 436 F.Supp. 1300 (W.D. Pa. 1977)
10. *E.E.O.C. v. Westnace Corp.*, 373 F.Supp. 895 at 994 (D.Md. 1974)
11. *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir.), cert. den. 429 U.S. 920
12. *Occidental Life Insurance Co. of Ca., v. E.E.O.C.*, 97 S.Ct. 2447 (1977)
13. *E.E.O.C., v. Baily Co.*, 563 F.2d 439 (6th Cir. 1977)
14. 2000e-5(g)
15. *E.E.O.C. v. Detroit Edison*, 515 F.2d 301 (6th Cir. 1975), vacated on other grounds 431 U.S. 951 (1977); *Harrington v. Vandalia-Butler Board of Education*, 585 F.2d 192 (6th Cir. 1978) (U.S. appeal pending); *Van Hoomissen v. Xerox Corp.*, 503 F.2d 1131 (9th Cir. 1974)
16. *E.E.O.C. v. Detroit Edison*, *supra*; *Slack v. Havens*, 552 F.2d 1091 (9th Cir. 1975); *Robinson v. Lorilland Corp.*, 444 F.2d 791 (4th Cir.) cert. dismissed, 404 U.S. 1006 (1971); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969)
17. *Harrington v. Vandalia-Butler Board of Education*, *supra*.
18. *Monell v. Department of Social Services of the City of New York*, 98 S.Ct. 2018 (1978); 2000e, (a), (b)

19. Howard v. Lockheed-Georgia Co., 372 F.Supp. 854 (N.D. Ga. 1974); E.E.O.C. v. Detroit Edison, supra.

20. Furnco Construction Co. v. Waters, 98 S.Ct. 2943 (1978); International Brotherhood of Teamsters v. United States, 431 U.S. 344 (1977).

21 Furnco Construction Co. v. Waters, supra; Board of Trustees of Keene State College v. Sweeney, 18 E.P.D. Para. 8672 (U.S. 1978).

22. McDonnell Douglas Corp. v. Green, supra, at 804.

23. Hazelwood School District v. United States, 97 S.Ct. 2736 (1977).

24. Hazelwood School District v. United States, supra.

25. Regents of the University of California v. Bakke, 46 U.S.L.W. 4896; Detroit Police Officers Assn. v. Young, 446 F.Supp. 979 (E.D. Mich., 1978).

26. Weber v. Kaiser Aluminum and Chemical Corp., 563 F.2d 216 (5th Cir. 1977), U.S. appeal pending.

27. Weber v. Kaiser Aluminum and Chemical Corp., supra.

28. 2000e-5(k)

29. Rosenfield v. Southern Pacific Co., 519 F.2d 527, (9th Cir. 1975); Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977).

30. Neuman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968)

31. Christiansburg Garment Co. v. E.E.O.C., 46 U.S.L.W. 4105 (1978).

32. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)

DEFENSE OF CHARGES BROUGHT PURSUANT TO TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

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When Title VI of the Civil Rights Act of 1964 was enacted, it was hailed as " . . . a new approach to the complex problem of school desegregation (designed) to counteract the judiciary's continuing failure to vigorously enforce . . ." the mandate of Brown v. Board of Education. Since the approach of this legislation is to penalize institutions for discrimination based upon race, color or national origin, by terminating or withdrawing federal financial assistance, and literally hundreds of school districts in the South had been operating dual school systems pursuant to state law, the principal enforcing agency, the Department of Health, Education and Welfare (HEW) met little resistance in demanding and receiving desegregation plans. Recently, however, as HEW has focused its efforts upon school districts located in states with no statutorily mandated separation of the races, there has been increasing resistance to HEW in its efforts to pursue remedies under Title VI.

Two recent attempts by HEW to invoke the administrative procedures promulgated pursuant to Title VI have resulted in failure to establish a violation or effect a fund cutoff. One was an attempt by HEW to institute administrative proceedings before an administrative law judge against the City of Baltimore and the State of Maryland, which was met with a civil action filed in the United States District Court seeking a permanent injunction enjoining HEW from proceeding against those educational institutions, and the other involved administrative proceedings commenced against the School District of the City of Saginaw, Michigan, where the administrative hearing process ran its course, and a finding was made by the administrative law judge that HEW had failed to prove its case with respect to discrimination in the assignment of students and it failed to negotiate in good faith with respect to the issue of faculty assignment.

Drawing on the experiences from these two proceedings, set forth below is a discussion of what is hoped will be helpful suggestions to school district attorneys when faced with the bureaucratic complexity of Title VI enforcement action.

Before discussing the various stages of a Title VI enforcement proceeding, several general comments are in order. Last month, in a brief filed with the United States District Court for the District of Columbia, the Justice Department stated that because of legislative limitations imposed upon the transportation of students to achieve racial balance, in present and future cases where school districts refuse to adopt and implement voluntary desegregation plans requiring transportation, that HEW will refer such cases to the Justice Department for the commencement of judicial enforcement actions.[1]

Given this expression of intent, more and more school districts, which by their size and configuration cannot, by HEW's standards, be desegregated without the use of student transportation, will find themselves the objects of litigation commenced by the Justice Department under any number of federal statutes, to wit: Title VI of the Civil Rights Act of 1964, Title IV of the Civil Rights Act of 1964 or the Equal Educational Opportunity Act. Whether HEW will attempt to achieve remedial action through voluntary efforts in the negotiation process before referring such cases to the Justice Department remains to be seen, but it is clear that in Title IV and EEOA cases, such negotiations may not be required to take place under the same "good faith" standard as those necessary as a precursor to Title VI administrative enforcement.

WHEN HEW CALLS . . .

When dealing with officials of HEW, and those assigned to the Office for Civil Rights in the ten regional offices, school district attorneys are advised to follow three simple rules:

(1) Do not accept HEW facts and figures at face value;

(2) Although HEW has data as a result of reports filed or investigation, offer no statistical, demographic or other data unless specifically requested;

(3) Persistently demand in writing a detailed plan or remedy which HEW determines will be sufficient to achieve compliance.

By assuming this posture in the defense of your clients, you will be shifting the burden of "good faith" negotiation to the government, and protect the interests of your clients by restricting the amount of evidence which HEW has to work with if and when administrative hearings are commenced. All too often, in the past, school districts have willingly provided HEW with reams of information and misinformation in an effort to negotiate a settlement to avoid fund cutoff, while literally "giving away the store" when the adversary proceeding begins.

A final suggestion which is crucial to the defense of a school district in a Title VI proceeding, or any other school desegregation case, is that you keep abreast of the current state of the law in this field. Decisions by district courts, state civil rights agencies, administrative law judges, HEW's Reviewing Authority, and even state courts, are rendered almost daily, and impact upon the decisions which you must make in dealing with the Title VI process. In addition, legislation dealing with available desegregation remedies and proposing new avenues of enforcement are constantly being debated in Congress, particularly by way of amendment to appropriations bills. The school district attorney should have resources available on these current developments in order to assist him throughout the negotiation process and the administrative hearing proceedings. Such publications as School Law News, Education Daily, NOLPE Notes, or frequent reference to Lexis or Westlaw will assist in obtaining such information.

It should also be noted that under the regulations for implementing Section 504 of the Rehabilitation Act of 1973 (45 CFR 84) an administrative procedure similar to Title VI procedures is contemplated. The procedure is slightly different under the Buckley Amendment regulations, 45 CFR 99. Title VI of the Civil Rights Act of 1964, states:

> No person in the United States shall, on the ground of race, color or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[2]

It has been stated by Richard Slippen, the Administrative Director of HEW's Title VI Reviewing Authority (Civil Rights), that Title VI represents part of "a new approach to the complex problem of school desegregation (design) to counteract the judiciary's continuing failure to vigorously enforce"[3] the mandate of Brown v. Board of Education.[4]

As a primary federal agency involved with disbursing funds to educational agencies, HEW is empowered by Title VI to terminate or refuse to grant federal financial assistance to school systems which it finds to be violating its proscriptions.[5] Those federal financial assistance programs over which HEW possesses Title VI enforcement powers are listed in 45 CFR Part 80, Appendix A (1973)[6] (including such programs as Title I Compensatory Education, etc.).

Under regulations "appropriately" promulgated by HEW,[7] the Office for Civil Rights (OCR) operates as the primary enforcer of Title VI.[8] Title VI provides HEW with two avenues for enforcement[9] -- through Department of Justice action[10] in the United States District Court or by the administrative hearing process. This article will focus on HEW's Title VI administrative enforcement approach as it involves elementary and secondary school systems.

The two basic methods whereby HEW and OCR seek compliance with Title VI (as well as other civil rights statutes) are: (1) complaint investigation[11] and (2) compliance review.[12] The basis for OCR's attempts to enforce compliance with non-discrimination provisions of Title VI is grounded upon recipients' "assurances". Assurances of compliance with Title VI, analytically contractual in nature, are required in every financial assistance application as a precondition to its approval or continuance.[13] As stated in OCR's policies pamphlet[14] OCR accepts three types of assurances of compliance:

(1) From schools subject to a final court order of desegregation, by written assurance that the system will comply with the court's order;

(2) By systems voluntarily desegregating through a Form 441-B Assurance of Compliance; and from all other school systems;

(3) By a 441 Assurance of Compliance obligating the system to comply with Title VI.

These two basic methods through which OCR seeks to enforce compliance with Title VI assurances will now be separately addressed.

COMPLAINT INVESTIGATION

A complaint may be filed by an individual or entity with one of the ten regional civil rights offices.[15] OCR, long criticized for delays in investigating complaints, is now subject to an order entered by Judge John Pratt of the United States District Court for the District of Columbia on December 29, 1977,[16] setting forth clearly delineated procedures and strict timetables when investigating complaints. Within fifteen days after receiving a complaint, OCR must notify the complainant that the complaint is "complete" or "incomplete" (in which case the complainant must be advised as to deficient information). Once the complaint is "complete", OCR has fifteen days to notify the school charged with the violation what charges have been filed against it.

Within one hundred five days after a complaint is received, OCR must determine if the school is actually violating the law. If OCR determines the school has not violated the law, the complainant must be given a chance to refute that finding. If the institution is found in violation, a "Letter of Finding" of presumptive noncompliance is issued, and OCR has one hundred ninety-five days after the complaint is filed to negotiate a remedy. If OCR concludes that voluntary compliance cannot be secured, administrative enforcement and deferral proceedings against the school must be commenced no later than two hundred twenty-five days after the complaint is filed. During

OCR's investigation, the complainant must be interviewed and upon request be furnished a copy of all correspondence sent to the school concerning any remedy of a violation.

COMPLIANCE REVIEW

On its own initiative, (or during investigation or a complaint), OCR conducts periodic compliance reviews of school systems.[17] Under the Adams v. Califano[18] settlement, OCR also must comply with certain timeframes. Within ninety days after a compliance review has commenced, OCR must determine whether or not the institution is in compliance. If OCR determines there is noncompliance, the specific areas of noncompliance must be set forth in the Letter of Finding sent to the institution. OCR must then seek, through negotiation, to resolve the outstanding noncompliance. If the noncompliance remains unresolves, formal enforcement action must be commenced not later than one hundred eighty days after initiation of the compliance review.

Such compliance reviews may be triggered by data periodically submitted to OCR by state departments of education and all school districts which receive federal funds. For example, the periodically submitted OS/CR 101-102 Civil Rights Survey forms and the EEO-5 Staff Assignment Reports may lead to compliance reviews where statistical "questions" arise.

When a regional OCR office undertakes a complaint or compliance review investigation, OCR examines "the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance . . . occurred, and other factors relevant to a determination"[19] as well as other salient data. Such review may be conducted through data analysis, written correspondence, and on-site inspections and review of documents at the school district offices. Counsel for the school district should be immediately notified whenever a compliance review is undertaken, or data requested. Counsel should always attempt to be present at on-site inspections and meetings between district and OCR personnel. The school district must adhere to a uniform policy of referring immediately HEW correspondence to Counsel; no response to requests for information should be sent without the involvement and prior approval of Counsel.[20] A coordinated response system cataloging all correspondence between the district and HEW and other federal agencies should be implemented.

If after investigation there appears to OCR to be a failure to comply with Title VI, the district will be notified by a Letter of Finding (of presumptive noncompliance) from the regional office which is approved, pursuant to HEW policy, by the Office for General Counsel. Under the holding in Mandel v. HEW (discussed below), OCR in this letter must specify those programs, on a program-by-program basis, deemed noncompliant, and the reasons for the presumed noncompliance. At this juncture, where a district has been notified that it is in "presumptive noncompliance" with Title VI, the district is thereafter provided an opportunity to rebut the presumption. This phrase--presumptive noncompliance--is not found in Title VI nor in HEW regulations. As OCR is required to attempt to resolve any failure to comply with Title VI by "informal means"[21] if no opportunity were provided to rebut alleged noncompliance, OCR's attempts to informally resolve such matters would be highly suspect.

42 USC §2000d-1 provides in pertinent part:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under (a) program or activity (receiving federal financial assistance) to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement . . .: Provided, however, that no such action will be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with such requirements and has determined that compliance cannot be secured by voluntary means . . .

This section makes clear that OCR's efforts at achieving voluntary compliance impose a continuous duty, commencing with the initial Letter of Finding of presumptive noncompliances and continuing up to, and logically throughout, the administrative hearing process.

Clearly, good faith efforts to secure voluntary compliance must be exercised prior to the commencement of formal administrative hearings by the very terms of Title VI and HEW's regulations. However, it is also OCR's policy that efforts to achieve voluntary compliance may proceed parallel with the administrative enforcement process, consonant with Title VI's objective--voluntary compliance.

45 CFR Part 80.6(a) requires that HEW and OCR:

> Shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily . . .

Furthermore, OCR's Policies pamphlet obligates OCR to expend good faith efforts at achieving voluntary compliance. That pamphlet states:

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> Where review of a school system indicates noncompliance with the Assurance of Compliance and Title VI, the Office for Civil Rights staff will make every reasonable effort to achieve compliance through negotiation.
>
> The first formal step of such negotiation is a letter from the Office for Civil Rights . . . offering the school system assistance and guidance on the best manner to achieve compliance. If a school system submits a plan which is unsatisfactory in any respect, the Office for Civil Rights will inform the school system in detail and in writing of the areas in which the plan is not satisfactory.
>
> If local officials so request, the Office for Civil Rights will at any state of negotiation recommend in writing specific steps the school system may take to achieve compliance.[22]

In Mandel v. HEW,[23] HEW was held to be required to pursue voluntary compliance in good faith under Title VI, its regulations and HEW's own policy statements.[24] As a practical matter, OCR's policies pamphlet in paragraph 22 imposes upon a school district the duty to sumbit a plan to ready alleged noncompliance.[25] However, on request, OCR must also recommend specific steps as to how to remedy such noncompliance. This duty is imposed by the "negotiation" process which is activated by the Letter of Finding of presumptive noncompliance. In addition, it is OCR's policy that upon written request, OCR will furnish guidelines with respect to remedying compliance, but will not formulate a specific plan for the school system. OCR often exalts form over substance in negotiating compliance; a meeting between the school district and OCR, held at the district's request is of little use where OCR proffers no specific assistance in recommending how to come into compliance. The fact OCR attends a meeting so requested, without more, does not fulfill the duty to negotiate in good faith.

OBLIGATION TO NEGOTIATE

OCR's obligation to negotiate voluntary compliance in good faith can be separated into three stages during appropriate timeframes and "negotiation" periods imposed by the Adams v. Califano settlement.[26] Stage I may be defined as the period after the Letter of Finding is issued (as approved by the Office of General Counsel, "OGC") to the point where the regional office concludes that voluntary compliance cannot be effected. Stage II may be defined as that period following the referral of the case to Washington and the decision of the Director of OCR that voluntary compliance may not be achieved; the case is then referred to OGC with a recommendation to commence administrative proceedings. Stage III may be defined as that period following the referral of the case to OGC during which its decision to commence administrative action is considered; during this stage, General Counsel staff members assigned to review the case may participate personally in further negotiations between OCR and the school system. Keeping in mind the constricted period (ninety days for compliance reviews, one hundred twenty days for compliance investigation) between the issuance of a Letter of Finding and commencement of administrative proceedings (signalled by General Counsel's issuance of a Notice of Opportunity for Hearing)[27] as well as good faith requirements imposed upon OCR in negotiating voluntary compliance, it is critical that the school system properly mobilize its resources to fully and adequately respond to HEW charges.

During the Stage I phase, the administration of the school district will be notified through the Letter of Finding those areas OCR deems in noncompliance with Title VI. This letter, of course, formally apprises the district that the Title VI funding termination procedure is activated. Depending on the gravity and accuracy of the charges, among other factors, the school system can elect to remedy the alleged noncompliance or rebut the charges. However, it is seldom if ever the case that rebuttal of OCR charges will not result in partial or substantial narrowing (or elimination) of OCR concerns and charges. Therefore, even if a school system at a later stage does decide to remedy those areas in which it agrees it may be noncompliant, those areas will be refined, and consensual in scope.

REBUTTING OCR'S FINDINGS

In order to prepare to rebut OCR's findings, it will become necessary to review and assemble considerable amounts of data previously submitted to HEW and OCR. However, if the previously discussed policy of advance clearance with counsel of response to all HEW and federal agency inquiries has been implemented successfully, the burden of accurate, factual response will be considerably eased. As the school district's policy of centralization will facilitate an adequate response and rebuttal to OCR charges, additional time to respond, if necessary, should be formally requested. While sifting data and preparing a detailed response is an onerous task, it is vital that rebuttal of OCR charges be as accurate and as complete as practicable. Inaccurate or incorrect data contained in a rebuttal will only work to the detriment of the school district in subsequent proceedings.[28]

At all times during Stage I, there will normally be extensive and continuing discussions between OCR and the school district. It is strongly advised that all communications be formalized and reduced to writing. Meetings (transcribed, if desired) between OCR and the school district may further reduce those areas in dispute. As OCR is obligated by Title VI, its regulations, and policies to "make every reasonable effort to achieve compliance through negotiation"[29] the district should not hesitate to request in writing any meetings, information or assistance deemed necessary to narrow or resolve the issues in dispute. Furthermore, OCR must respond to any plan for compliance submitted to it, make commentary thereon, indicate deficiencies, and otherwise evaluate data submitted by a district. In Mandel v. HEW,[30] HEW was held not to have sought compliance in good faith by voluntary means where it did not furnish the State of Maryland specific information with respect to alleged higher education violations and what remedial efforts were required. Mandel also held that HEW failed to negotiate in good faith by not informing the City of Baltimore in writing, after two pupil desegregation plans had been submitted and rejected,[31] of specific, detailed deficiencies, as required by OCR's policy pamphlet.[32]

After submission of a third pupil desegregation plan in Mandel, OCR, while rejecting the plan, sent a detailed critique. However, OCR would not grant the City additional time to correct deficiencies but set a date for commencement of administrative hearings and ordered deferral.[33] After each plan submitted by the City of Baltimore was rejected by OCR, the City communicated to OCR its desire to develop an appropriate desegregation plan and decried the lack of an opportunity to correct the third plan submitted to OCR before administrative hearings were ordered. The Mandel court viewed HEW's behavior as precipitous, arbitrary and contrary to its duty to negotiate in good faith. In response to this factual record, the District Court preliminarily enjoined the commencement of administrative proceedings, holding in a landmark ruling that OCR must negotiate in good faith to achieve voluntary compliance as a precondition to administrative enforcement.

> Defendents have overwhelmingly refused to negotiate in good faith, afforded scant specificity and guidance to assist the City, and repeatedly declined to pursue voluntary compliance. Rather, defendants have sought to bludgeon compliance through initiation of unwarranted and premature enforcement procedures. This Court must accordingly declare that (OCR's) actions were in brazen defiance and in direct contravention of Title VI and paragraph 22 of (OCR's) own policy statement.[34]

While Mandel demonstrates that OCR must negotiate in good faith, it also points out that a school district must be able to ascribe specific arbitrary behavior to OCR. However, a school district must be able to call into play its combined adminstrative and legal resources in order, literally, to force OCR to comply with Title VI and its regulations and OCR's own policies during the negotiations stages.

KEEPING OCR HONEST

In those areas where OCR fails to follow its regulations or policies, letters should be sent to the Secretary of HEW, the Director of

OCR and the regional director specifying the deficiencies in OCR voluntary compliance efforts and the resulting detriment to the school district. At this stage, additional meetings between OCR and school district officials will often be held to further attempt to negotiate voluntary compliance. At all stages of the voluntary compliance process, it is incumbent upon the school district to request meetings and assistance, as OCR's obligation to meet and render assistance is only then called into play. Upon request or upon submission of a plan, OCR must make specific or detailed comment.[35]

In the initial decision *In The Matter of the School District of the City of Saginaw, Michigan* (HEW Title VI Administrative Proceedings), Docket S-124 (September 16, 1977) ALJ Charles Campbell found after an extensive hearing that OCR failed to supply, in response to oral and written request, faculty reassignment requirements, until after the school year had commenced, one day prior to institution of the administrative proceedings.[36] In dismissing the allegations concerning faculty assignment, the ALJ held OCR had failed to seek good faith voluntary compliance prior to instituting the administrative proceedings.[37] While OCR's efforts will be judged *in toto*, it is also clear that specific OCR assistance in the area of student desegregation (e.g., clustering, magnet schools, walking plans, etc.) cannot be construed as good faith negotiation in the area of teacher assignment.

Once the case has been referred to OGC with a recommendation for administrative enforcement, the General Counsel may seek further meetings between OCR and the school district. This phase represents the final period prior to the institution of the administrative proceedings whereby OCR must undertake good faith negotiation. At this point, specific comment by OCR on plans or on requests for advice become quite important. If, for example, a remedial plan of teacher assignment is submitted to OCR, and OCR's detailed response and demand for immediate *Singleton*[38] redeployment is not received until after commencement of the school year or immediately prior to the commencement of administrative hearings, its "good faith" efforts to assist and advise will be highly suspect. Therefore, timing becomes critical. As *Mandel* makes clear, OCR's efforts must not be arbitrary and do not take place in a vacuum.

> Federal agencies will be held to strict compliance with their own regulations and rules of procedure, when a failure to observe them results in prejudice to a party they were designed to protect.[39]

The formal administrative enforcement process is commenced by the filing of a Notice of Opportunity for Hearing[40] by OGC. The practice and procedure in the Title VI adminstrative hearing is found at 45 CFR Part 81.[41]

At the time the Notice of Opportunity for Hearing is issued, the Secretary of HEW informs the school district in writing that all applications for new federal funding will be deferred.[42] With respect to deferral, the Eshleman Amendment[43] confers specific due process rights upon the school district. The school system must be provided at least thirty days prior written notice of deferral, identifying those programs HEW deems to be in noncompliance with Title VI.[44] The school district must be provided an opportunity for a hearing before an administrative law judge (ALJ)[45] within sixty days from the date of deferral, unless this period is extended by mutual consent.[46] Also, the hearing must be concluded and a decision rendered within ninety days from the commencement of a hearing, unless the ALJ determines in writing that decision cannot be rendered within the ninety day period, in which case an additional sixty days (for a total of one hundred fifty days) from the date of the beginning of the hearing is allowed.[47] When a school system, in its answer to the notice,[48] requests a hearing,[49] the strict time constraints imposed by the Eshleman Amendment may be used to the advantage of the school district.

While Eshleman was designed to protect a school district from the harm occasioned by protracted HEW deferral, witout a timely administrative hearing, (see 122 Cong. Rec. #5592) (Oct. 1, 1976, remarks of Rep. Eshleman), the specific time limits governing deferral may be extended by written stipulation of the parties directed to the ALJ, as the "protected" party-- the school district-- may waive its statutory rights. As the ALJ is required to hold the hearing within sixty days of the sending of the Letter of Deferral (which usually coincides with the sending of a Notice of Opportunity for hearing), this constricted time span imposes considerable burdens upon OGC where the school district is prepared to vigorously contest the allegations and insist upon elemental due process. In such a situation, the quid pro quo sought for any agreement to extend the commencement of the administrative hearing beyond the prescribed sixty day period should be the lifting of deferral by the Secretary of HEW.

Therefore, it is suggested that new program applications for funding be filed as per normal practice irrespective of the initial deferral imposed. The additional preparation time obtained by the filing of such a mutual consent will allow the school district to prepare a more adequate defense against the allegations. In addition, counsel for the school district will be deeply involved in responding to the notice, answering complex and involved requests for admissions of fact and genuineness and authenticity of documents,[50] which may also be served upon OGC, as well as other agreed-upon pre-hearing discovery. While there is no pre-hearing discovery provided in Part 81, the parties may stipulate to any discovery they desire; interrogatories, for example, may be submitted upon stipulation. However, it is seldom the case that OGC will stipulate to provide a school district discovery. Therefore, ingenuity must be exercised by counsel for the school district through the framing of discovery-oriented motions addressed to the ALJ.[51] If there is something counsel desires to examine (e.g., 441 Compliance Review Manual setting forth efforts OCR must undertake to secure voluntary compliance), a record should be made by filing a motion or demand for production. Information requests and documents available under the Freedom of Information Act[52] provide considerable assistance to counsel in effective cross-examination of HEW witnesses at the hearing.

The Index of Current Documents of the Office of Civil Rights can be requested from the OCR Public Information Officer in Washington. This Index topically lists Reviewing Authority Opinions;[53] initial administrative decisions; numerous HEW and OCR policies on compliance policy and activity, and nondiscrimination requirements; compliance review; and myriad other documents.

STRESS FAILURE TO NEGOTIATE

The issue of OCR's failure to negotiate in good faith to secure voluntary compliance should become an oft-repeated theme. As good faith efforts to secure voluntary compliance are pre-conditions to the commencement of the administrative hearing, the ALJ should be requested, in the school district's answer to the notice, to dismiss the hearing on this basis. The necessity of OCR's good faith compliance effort as a pre-condition to commence a hearing should be planted in the mind of the ALJ at the earliest possible time, and be reinforced and amplified throughout the hearing. Particularly in light of Mandel, it is incumbent upon the school district to raise defective voluntary compliance efforts. While it is, of course, unlikely that the ALJ will dismiss the proceeding prior to the completion of the actual hearing, motions and arguments for dismissal made during the hearing and in post-hearing briefs may prove productive in appropriate cases.

The absence of presidential approval of the Title VI hearing procedure, embodied in 45 CFR Part 81, should be raised in the Answer as an affirmative defense and in a Motion to Dismiss, and throughout the hearing itself. The absence of presidential approval, as required by 42 USC §2000d-1,[54] is an issue that has not been resolved, by administrative or judicial decision.[55] The legislative intent embodied in 42 USC §2000d-1 requires presidential approval; there has not been presidential approval of Part 81, nor has Part 81 been approved by the Attorney General following presidential delegation of this function in 1974.[56] A ruling by the ALJ granting a motion to dismiss based on this defect would preclude the holding of a Title VI proceeding,[57] Part 81 recites that it is adopted under 5 USC §301 and 45 CFR 80.9(d). However, a general statute or administrative regulation cannot defeat a specific enabling statute.[58]

Also, the School District may request the ALJ appointed to hear the case to certify the allowance of an interlocutory appeal to the Reviewing

Authority on any pre-hearing matter.[59]

In light of Mandel, injunctive relief restraining the commencement of the administrative hearing should be sought. While the rule requiring exhaustion of administrative remedies must be overcome, one of the primary exceptions to the doctrine exists where an agency acts in "brazen" defiance of its statutory authorization.[60] Under the holding in Mandel, HEW must specify on a program-by-program analysis those areas in which a school district is deemed noncompliant. This examination must take place prior to the commencement of administrative enforcement proceedings (during the voluntary compliance stages).[61] Lack of presidential approval of Part 81 should be addressed as a basis for injunctive relief.[62] Along the same line, the constricted discovery and loosely-structured hearing procedure under Part 81 should be assailed as violative of due process. For example, there is no right to subpoena witnesses and documents;[63] no provision for discovery by written interrogatories or otherwise; no specification of conditions under which depositions may be taken or used, all inhibiting the effective defense of charges and right to cross-examination. Counsel should challenge the Part 81 evidentiary standards as violative of Section 254 of the Equal Educational Opportunities Act of 1974,[64] and argue, instead, for the application of the Federal Rules of Evidence.[65]

Another ground for injunctive relief is provided by the judicial standard of review of agency decision terminating federal assistance; the "substantial evidence" test provides insufficient judicial safeguards against due process violations inherent in the Part 81 hearing process. Irreparable harm may be demonstrated by the actual detrimental impact of federal fund deferral, as well as "loss of reputation" occasioned by HEW's actions, as stated by the court in Mandel.[66] The refusal of the ALJ to certify an interlocutory appeal to the Reviewing Authority, on motions raised by the school district, should also be assailed as prejudicial, causing irreparable harm to the school district's effective defense of the charges.

The practice and procedure at the administrative hearing proper is controlled by Part 81, and the provisions of the Administrative Procedure Act.[67] Thorough pre-hearing preparation is crucial; in a Title VI hearing, the HEW allegations commonly span many years and numerous school district decisions and practices.

HEW assumes that a school district must be discriminating against its students if racial imbalance in schools exist. This assumption, predicated upon student assignment statistics (per OS/CR 101 and 102 forms), ignores the mandate of the United States Supreme Court, and fails to consider the impact of multiple productive factors, many beyond the realm of school district decisionmaking. As stated in Washington v. Davis, 426 U.S. 229 (1976) and its progeny, predominantly black and white schools are not alone violative of the Constitution; intentional segregative board actions causing or contributing to racial imbalance must be established. The reliability of statistics in establishing illegal discrimination is clearly disfavored by the courts;[68] all relevant factors must be considered.

ASSUME NO ALLEGATIONS ARE TRUE

Nothing alleged by HEW in its Notice or in Requests for Admissions, can be accepted at face value. Where census data is utilized, the decennial Census and Housing data must be reviewed. The census definitions, for example, are critical. Until the 1970 census, Hispanics were lumped in the "white" category; "non-white" comprised Negroes as well as Indians and Orientals. Since HEW considers Hispanics, Indians and Orientals as non-whites, HEW allegations for the years 1940 through 1960 will substantially underrepresent minorities, and over-represent whites. This data deficiency is particularly acute for a school district that is racially ethnically polyglot. Therefore, it is critical to scrutinize Census and Housing data as contrasted with HEW's definitions of minority. This analysis is also invaluable where discriminatory selection and boundary changes are alleged. In both the 1940 and 1950 housing Census data, housing is broken down in wards and blocks; in the 1960 and 1970 Census, tracts and blocks are used. Each decennial Census has its own peculiarities, presenting imprecise and unreliable data. Furthermore, neither Census or Housing data provide information as to the age of household occupants, and whether any of the occupants attended public school.

In urban school districts experiencing increasing minority student population accompanied by a corresponding decrease in white student population, decennial Census data can be contrasted with mid-census statistics prepared by R.L. Polk & Company, which can profitably be used to chart residential housing and population migration within each census tract during five year periods.[69] This information can be coupled with city Planning Department studies and predictions, federal and state highway placement and disruption, urban renewal program dislocation and myriad other public and private factors contributing to residential re-alignment.

While HEW has imposed since approximately 1968, as a continuing condition for receipt of federal funds, the submission of period racial-ethnic data concerning students and teachers, information for earlier years can only be roughly approximated by HEW through the use of the imprecise Census and Housing data. Therefore, it is stressed that no pre-1968 student racial-ethnic data be submitted to HEW by the school district during compliance reviews or at any other time. HEW may request during an on-site compliance review that the district submit for each school "percentage" estimates of student racial-ethnic data for years prior to 1968, based upon recollection of teachers or principals. Since it was illegal in many states, as in Michigan, to maintain student racial-ethnic records prior to 1968 (until authorization by Title VI regulations), the district should in response to such requests, inform HEW that it is not possible to compile such information for years prior to 1968 as the maintenance of such information was prohibited by state law.[70] The offices of the state civil rights agencies can be contacted to determine if any complaints or investigations concerning the school district's practices or policies exist on file.

Allegations concerning discriminatory school construction and overcrowding may be approached through a variety of methods. Prime considerations are the extent to which the school district is "built-up", the availability of vacant land, whether or not condemnation is exercised. Testimony from the city Planning Director should be considered on this point. Any boundary changes concerning schools should be mapped and placed on transparencies for comparison, and the boundaries coordinated with available Census and Housing data. For the entire district, all schools and their respective boundaries should be mapped, each schools' capacity (adjusted for building additions and classroom modifications) for each year should be contrasted with its pupil population; enrollment as percent of capacity may thereby be derived.

As the physical plant and condition of each school may vary with the use to which it is put, this information will properly supplement the capacity figures. Physical barriers present questions of pupil safety and easy access to neighborhood schools, and may be profitably illustrated by aerial, as well as other, photographs. The irregular shape of certain attendance areas, reflecting safety concerns, may thereby be further explained. An onsite inspection of the school district by counsel and the ALJ, demonstrating physical barriers and attendance boundaries, may be very helpful. Physical plan comparison, year of construction and additions, and whether re-construction occurs on the same site, coupled with population data, are also helpful information. In addition, testimony from a school planner may be beneficial; valid considerations such as safety, acreage requirements, walking distances, "compactness" physical barriers, projected enrollment and program function represent those concerns properly considered in school construction decisions. Finally, at least sixteen states have adopted the Guide For Planning Educational Facilities, Council of Educational Facility Planners, Int'l.; this source may provide a valuable source of information in school construction capacity allegations. The historical evolution and development of the school district is always an important consideration.

HEARING PROCEDURES

At the administrative hearing "rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied. . ."[71] by the ALJ. As both Part 81 and the Administrative Procedure Act govern the hearing,[72] it is advisable to be familiar with Professor Davis's Treatise, Administrative Law. 45 CFR Part 81.63 sets forth the authority of the ALJ as well as establishing "the duty to conduct a fair hearing. . .". The duty of fairness encompasses the duty of impartiality, and this precept should be constantly stressed. In addition, HEW bears the burden of proving its allegations. With these general comments in mind, some specific observations concerning the actual Title VI hearing will be made.

Since no subpoena power is provided the ALJ in Part 81, it is necessary for the school district to secure the voluntary attendance of any witnesses it desires to present. If there are employees of HEW whom the school district wishes to call as witnesses, the General Counsel should be requested, on the record, to produce such witness for cross-examination, as the school district cannot subpoena that person. If the requested witness is not produced, any document prepared by that person may be excluded from evidence by the ALJ[73] as violative of the school district's right to cross-examination.[74] Where any HEW witness does testify, it is advisable to request the ALJ to require that person to return for further cross-examination, if necessary;[75] in the event that person does not, or refuses to return for further cross-examination, the ALJ can be requested to strike the testimony.

A closely related issue arises when, during the course of cross-examination, a HEW witness refuses to answer the question asked. As the ALJ is without authority to compel attendance of witness by process, the ALJ is also without authority to cite a witness for contempt for refusal to answer a question. 45 CFR Part 81.63(g) provides the ALJ authority to direct a witness to testify and subsection (h) provides the authority to "exclude or limit evidence"; the ALJ should be requested to limit or exclude testimony and documentary evidence to which the unanswered question pertains. It must be emphasized that uncorroborated hearsay is not credible testimony.[76] Striking testimony or exhibits is the only way in which an ALJ can give substance to 45 CFR Part 81.63(g), which provides authority "to direct witnesses to testify". Finally, while hearsay evidence may be received in a Title VI proceeding,[77] "unreliable" evidence may be excluded under Part 81.78.

In the event that a government witness testifies as to substantive standards governing HEW voluntary compliance efforts, contained in a document not in evidence nor previously procured through a Freedom of Information Act request, the ALJ should also be requested to limit or strike such testimony. In the alternative, if such testimony is received in view of the liberal evidentiary standards applicable to the hearing, the ALJ should be requested by motion to order the production of the documents in question, or condition receipt of the evidence upon production of the document or its admission. The right to effective cross-examination is deeply implicated in such a motion, if HEW refuses to voluntarily produce the documents. However, the authority in the ALJ "to direct witnesses to testify",[78] and the applicability of the Freedom of Information Act[79] should be vigorously advanced as vital to a fair hearing and to "assure production of the most credible evidence avilable and to subject testimony to test by cross-examination. . ."[80]

During its case in chief, OGC may attempt to introduce evidence on matters not contained within the Notice (or amended Notice). The Notice of Opportunity for Hearing serves to set forth "the matters of fact or law asserted as the basis for (adminstrative enforcement) action . . .";[81] while the Notice or Answer may be amended as a matter of course before the hearing, "a notice or answer may (thereafter) be amended only by leave of the presiding officer."[82] As the hearing is intended to receive evidence and expert opinion testimony "related to the issues (allegations) in a proceeding",[83] any attempt by OGC to "expand" the allegations at the hearing should as a matter of fairness be requested to be excluded by the ALJ.[84] If the ALJ permits evidence such "expanded" allegations, the certification of an interlocutory appeal should be requested at once.[85]

Charges concerning discriminatory assignment of teachers may be addressed by several methods. HEW will typically allege teacher discrimination where the ratio of minority to non-minority classroom teachers deviates by more than five percent (5%) from the district-wide ratio, under the "Singleton" test.[86] Although Singleton is arguably appropriate when utilized to remedy past, proven discriminatory assignment, the failure of a school district to distribute teachers within the Singleton limits (plus or minus five percent (5%) of the district-wide ratio) cannot be used as a valid litmus test for determining whether teacher assignment is prima facie discriminatory.

Generally, HEW will introduce statistical evidence covering several years, intended to substantiate disproportionate assignment of minority teachers to predominantly minority schools. HEW will seek to use this data to establish a positive correlation between the percentage of minority faculty and minority students; that such correlation could not occur by chance, but by improper assignment.

However, racially-neutral factors, such as certification, training, educational qualifications, seniority, and accreditation may assist the school district in rebutting a presumption of discrimination arising from teacher assignment statistics. These factors may be analyzed statistically to determine their relative impact upon assignment. The impact of federally-funded programs designed to recruit low-income participants and train them in the education of low-income children may serve to partially explain minority teacher distribution.[87] Granting of assignment or transfers on the "role model" theory, or upon teacher preference, irrespective of benign intent, has been held to reinforce rather than undercut the presumption of discriminatory assignment.[88]

During presentation of its case, HEW may call several teachers, generally minority, from within the district, who allege discriminatory assignment at the time of initial hire. The accuracy of such allegations can be determined by review of the teacher's initial application on file, as well as by examination of vacancies existing at the time of hire. Where a teacher testifies that he/she knows of other teachers discriminatorily assigned on initial hire, that person should be requested on cross-examination to provide the names of such individuals. If the names are not so provided, the hearsay testimony may be requested to be stricken. If the names are provided, as no subpoena power exists, it is suggested that registered letters be sent to these individuals, outlining the allegations and requesting their attendance and testimony at the hearing. These letters, and the responses thereto, should then be introduced as school district exhibits.

In the hearing protracted, the time limits for the rendering of a decisions by the ALJ under the Eshleman Amendment may be extended pursuant to stipulation of the parties. As earlier indicated, the school district may waive the due process rights conferred by Eshleman.[89]

To sum up, defending a school district against HEW allegations of discrimination in a Title VI proceeding is a formidable task. The most important advice that can be offered is to force HEW to follow its statutory duties, regulations and policies, and ensure that OCR follows its duty to negotiate in good faith as precondition to administrative enforcement. Seize the initiative and force HEW to prove its allegations.

FOOTNOTES

1. *The Detroit News*, Tuesday, March 14, 1978, p 5A.

2. P.L. 88-352, 78 Stat. 252; 42 USC §2000d.

3. Slippen, *THE TITLE VI ENFORCEMENT PROCESS: Administrative Enforcement of Civil Rights In Public Education: Title VI, HEW, And The Civil Rights Reviewing Authority*, 21 Wayne L. Rev. 931 (1975).

4. 347 U.S. 483 (1954).

5. A perceptive analysis of the legislative history of Title VI is provided in Owen, *What To Do When HEW Calls: Title VI of the Civil Rights Act of 1964*, 1977 Convention Supplement of School Law Seminar Proceedings, Council of School Attorneys, National School Board Association.

6. Slippen, *supra*, fn 7 at 932.

7. 42 USC §2000d-1 requires that where a federal agency seeks to effectuate Title VI (42 USC §2000d)"by issuing rules (and) regulations . . . (n)o such rule (or) regulation . . . shall become effective unless and until approved by the President". 45 CFR Part 80 (Nondiscrimination in Federally-Assisted Programs of HEW) was presidentially approved as required; 29 Fed. Reg. 16298 (Dec. 4, 1964), *as amended* by 32 Fed. Reg. 14555 (Oct. 13, 1967) and 38 Fed. Reg. 17979 (July 5, 1973). 45 DFR Part 81 (Practice and Procedure For Hearings Under Part 80) have never been presidentially approved; 30 Fed. Reg. 10234 (Aug. 18, 1965), *as amended* by 32 Fed. Reg. 15156 (Nov. 2, 1967) and 38 Fed. Reg. 17979 (July 5, 1973). Part 81 is further addressed at fn. 54-64, *infra*. Section 3 of Executive Order 11764 (39 Fed. Reg. 2575, Document 74-2022, Jan. 23, 1974) explicitly delegates the Presidential Title VI rules and-regulations approval function to the Attorney General, pursuant to 3 USC §301(1). E.O. 11764 is set forth in the May, 1977 U.S.C.S. Cumulative Supplement at 42 USC §2000d-1 (p. 332).

8. See, generally, 42 USC §2000d-1; 45 CFR Part 80; Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964, United States Department of Health, Education and Welfare, Office for Civil Rights (March, 1968) (hereafter "Policies"). In addition to enforcing Title VI, the ten (10) OCR regional offices are also charged with enforcement of Title IX of the 1972 Education Act Amendments (20 USC §1681; 45 CFR Part 86 (1975)); Section 504 of the Rehabilitation Act of 1973 (29 USC §706; 45 CFR Part 84 (1978)); and Executive Order No. 11246 (3 CFR Part 170 (1974)); 45 CFR Part 82 (1972).

9. 45 CFR Part 80.8(a)

10. Id.

11. Id. 80.7(b)

12. Id. 80.7(a); see Bowns, What To Do When HEW Calls: Office for Civil Rights Enforcement of Title VI, Title IX and Section 504, 1977 School Law Seminar Proceedings, Council of School Attorneys, National School Board Association, at p. 2.

13. 45 CFR Part 80.4(a)(1) states:

> "Every application for federal financial assistance . . . shall, as a condition to its approval and the extension of any federal financial assistance pursuant to the application, contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part . . . In all other cases the assurance shall obligate the recipient for the period during which federal financial assistance is extended pursuant to the application."

14. See "Policies", supra note 8.

15. In the years 1973 through 1976 OCR received the following number of Title VI education complaints annually, contrasted with the total number of complaint investigators in the ten regional offices:
1973: 369 complaints, 100 investigators;
1974: 597 complaints, 140 investigators;
1975: 645 complaints, 148 investigators;
1976: 615 complaints, 145 investigators;
Summary, Elementary and Secondary Complaints January 1--June 30, 1977, cited in Stalled At the Start, Government Action on Sex Bias in the Schools, Project on Equal Education Rights, NOW Legal Defense and Education Fund (1977) p. 58 (available from PEER, 1029 Vermont Avenue, N.W., Suite 800, Washington, DC 20005.)

16. Adams v. Califano, WEAL v. Califano and Brown v. Califano, ___F. Supp.___ (Case No. 3095-70).

17. 45 CFR Part 80.7(a).

18. See supra note 16.

19. 45 CFR Part 80.7(c).

20. *Id.* 80.7(d)(1); Policies *supra* note 8, paragraph 22 at p. 12.

21. See Policies, *supra* note 8, paragraph 22 at p. 12.

22. *Id.*

23. 411 F.Supp. 542, 547 (D.Md. 1976). On August 22, 1977, the City of Baltimore filed with the Fourth Circuit its *Motion to Vacate Judgment and to Enter Judgment Affirming the Order of the District Court, and in the Alternative, Petition for Rehearing*, in *Mayor and City Council of Baltimore, et. al. V.F. David Mathews, Secretary, United States Department of HEW, et. al.* On Febuary 16, 1978, the Fourth Circuit in a 3-to-3 decision, vacated its earlier 4-3 decision reversing the District Court. 562 F.2d 914 (4th Cir. 1977), issuance of a permanent injunction against HEW. If the District Court's preliminary injunction is made permanent, HEW will be precluded from commencing administrative hearings to terminate federal funds until HEW specifies on a program-by-program basis those programs not in compliance with Title VI, and until OCR has in good faith sought compliance by voluntary means as to those programs found to be noncompliant. 411 F.Supp. at 464. *Mandel* represents the program-by-program basis prior to the administrative hearing, those programs allegedly noncompliant; contrary to OCR's position, the Court has held that the entire system is not infected by a violation in one program. *See also*, *Board of Public Instruction* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969). Several United States district courts have held that a programmatic breakdown of noncompliant programs was not required as a precondition to Title VI administrative action. *School Dist. of the City of Saginaw* v. HEW, ___F.Supp.___(E.D. Mich.) (Civil No. 76-10121, March 9, 1977); *Seattle School Dist. No. 1* v. *Mathews*, ___F. Supp. ___ (W.D. Wash.) (Civil No. C76-296M, April 29, 1976).

24. See Policies *supra* note 8, paragraph 22 at p. 12.

25. See Policies *supra* note 8.

26. See *supra* note 16.

27. 42 USC §2000d-1; 45 CFR Parts 80.8 (c)(2), 80.9(a).

28. See Bowns, *supra* note 12, at pp. 7 and 8, for concrete and practical suggestions on working with the Office for Civil Rights.

29. See *supra* note 22.

30. 411 F.Supp. at 553-556.

31. *Id.* at 555.

32. See *supra* note 8, paragraph 22 at p. 12.

33. 411 F.Supp. at 555.

34. *Id.* However, see cases cited in note 23, *supra*, where injunctive relief was denied plaintiff school districts.

35. See Policies, *supra* note 8, paragraph 22 at p. 12.

36. Findings of Fact 111-114 (pp. 145-146).

37. Conclusions of Law 28 and 29 (pp. 152-153) state:

> "28. Where the General Counsel and OCR considered that the law required the School District to implement a plan for better integration of its faculty by the beginning of the 1976-77 school year; where on June 24, 1976 they orally agreed to furnish the School District with guidelines or requirements for an acceptable plan; where on July 20, 1976 the School District stated in writing that it was willing to reassign its faculty in accordance with their wishes; and where the guidelines or requirements for such acceptable plan were not furnished until September 16, 1976, which was after the School District's 1976-77 school year had begun and one day before the General Counsel instituted administrative proceedings, the General Counsel and OCR failed to fulfill their duty to seek voluntary compliance in good faith prior to the institution of admininstrative proceedings with respect to the School District's faculty assignment practices.
>
> 29. Where such failure occurred, a prerequisite for institution of the proceedings as to the School District's faculty assignment practices is missing, and the allegations as to that issue are subject to dismissal."

38. *Singleton* v. *Jackson Mun. Separate School Dist.*, 419 F.2d 1211 (5th Cir. 1970), *cert. denied*, 396 U.S. 1032.

39. 562 F.2d at 921, fn. 6.

40. 42 USC §2000d-1; 45 CFR Part 80.8 (c)(2); 45 CFR Part 81.51.

41. The questionable constitutionality of 45 CFR Part 81 is also noted in note 7, *supra*.

42. 42 USC §2000d-5.

43. Public Law 94-482, 90 Stat. 2232, 2333, 20 USC §1232i(b) (effective October 12, 1976) modifying 42 USC §2000d-5, as applied to educational institutions receiving federal funds.

44. 20 USC §1232i(b) (1).

45. The Reviewing Authority requests from the Civil Service Commission for an ALJ to preside and make an initial decision. 45 CFR Parts 81.61-62. The ALJ is assigned under 5 USC §3105 or §3344.

46. Id. §1232i(b) (2).

47. Id. §1232i(b) (3).

48. 45 CFR Part 81.52.

49. Id. 81.54.

50. Id. 81.77.

51. Id. 81.56.

52. 5 USC §552 (1974).

53. Reviewing Authority Opinions can be procured free of charge from the Hearing Clerk (Civil Rights), HEW.

54. See supra note 7.

55. The absence of presidential approval has been held to render certain administrative action unauthorized; Phillips v. United States Grain Corp., 279 F.244, 248, 249 (2nd Cir.) rev'd on other grounds, 261 U.S. 106 (1923); See also 25 Op. Atty. Gen. 270, 275. Cf. Cafeteria Workers v. McElroy, 367 U.S. 886 (1961). In Dermott Special School Dist. of Chicot Co. v. Gardner, 278 F.Supp. 687 (E.D. Ark. 1968), the absence of presidential approval of HEW guidelines was raised but not resolved by the district court. The absence of presidential approval of Part 81 was raised in School District of the City of Saginaw v. HEW, (E.D. Mich.) (Civil No. 76-10121, March 9, 1977) where the court denied injunctive relief, and ordered exhaustion of administrative remedies.

56. See supra note 9.

57. See note, The Authority of Administrative Agencies to Consider the Constitutionality of Statutes, 90 Harv. L. Rev. 1682 (1977).

58. E.G., Bong v. Campbell Art Co., 214 U.S. 236 (1908), aff'g 155 F.116 (2nd Cir. 1907); Roberts v. United States, 44 Ct.Cl. 411 (1909), Romeo Comm. Schools v. HEW, 438 F.Supp. 1021 (E.D. Mich. 1977).

59. 45 CFR 81.86 states:

> "Rulings of the presiding officer may not be appealed to the Reviewing Authority prior to his consideration of the entire proceeding except with the consent of the presiding officer and where he certifies on the record or in writing that the allowance of an interlocutory appeal is clearly necessary to prevent exceptional delay, expense or prejudice to any part, or substantial detriment to the public interest."

60. United States v. Feaster, 410 F.2d 1354 (5th Cir.), cert. denied, 396 U.S. 962 (1969), citing Leedom v. Kyne, 358 U.S. 184 (1958).

61. 411 F.Supp. at pp 558-559.

62. See cases cited in note 55, supra, where injunctive relief was denied.

63. The Reviewing Authority held 4-1 in Victoria Indep. School Dist., Docket S-60 (Dec. 14, 1975), that an ALJ has no power in a Title VI proceeding to issue subpoenaes (at p 4). The Reviewing Authority grounded its ruling on the Administrative Procedure Act, 5 USC §555 (d) and §556(c) (2), and the provisions of 42 USC §2000d-1 (which is silent on the question It is noteworthy that Title VII (42 USC §2000e), as implemented by 29 USC §161(1) does specifically provide the subpoena power in Title VII proceedings. The dissenter in Victoria (at pp 11-12) would hold the ALJ has the power to order production of HEW information in response to a motion, pursuant to Part 81.63 (power to rule on motions (e) and exclude evidence (h)).

64. 20 USC §1753 states:

> "The rules of evidence required to prove that state or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States."

65. The Reviewing Authority in Victoria, supra note 63, (at pp. 4-6) held that 20 USC §1753 does not require the application of the FRE in Title VI hearings.

66. 411 F.Supp. at 562.

67. 45 CFR Part 81.63(k); 5 USC §551 *et*. *seq*.

68. *E.g.*, *Hazelwood School Dist*. v. *U.S*., 45 U.S.L.W. 4882, 4886 (1977); *Mayor of the City of Philadelphia* v. *Educ. Equality League*, 415 U.S. 605, 620-621 (1974); *Alexander* v. *Louisiana*, 504 U.S. 625, 630 (1972); *Hester* v. *Southern Ry*. *Co*., 497 F.2d 1374, 1381 (5th Cir. 1974).

69. The Polk data does not provide information concerning race.

70. It is suggested that is possible to roughly approximate high school racial-ethnic data prior to 1968 by a year-by-year review of student photographs in the high school yearbooks.

71. 45 CFR Part 80.9(d)(2).

72. 45 CFR Part 80.63(k).

73. *Id.* §81.63(h).

74. *Id.* §81.79.

75. *Id.* §81.73.

76. See *Cohen* v. *Perales*, 412 F.2d 44, 52-54 (5th Cir. 1969).

77. 45 CFR Part 80.9(d); Part 81.63(k); 5 USC §556(d).

78. 45 CFR Part 81.63(g).

79. 5 USC §552 *et*. *seq*.

80. 45 CFR Part 80.9(d)(2).

81. *Id.* 80.9(a).

82. *Id.* 81.53.

83. *Id.* 81.72(a).

84. *Id.* 81.63.

85. Id. 81.86.

86. See *supra* note 38.

87. *E.g.*, Career Opportunities Program, Education Professions Development Act of 1967, P.L. 90-35, 20 USC §1091 *et. seq*.

88. *United States* v. *School Dist*. *of Omaha*, 521 F.2d 530 (8th Cir. 1975), *cert*. *denied*, 423 U.S. 946.

89. See *supra* notes 43-49 and text.

PUBLIC LAW 94-142: THE IMPOSSIBLE DREAM

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The Education of All Handicapped Children Act of 1975, which became law on November 29, 1975, has its foundations solidly on footings of Brown v. Board of Education. Other Acts, which apply at least in part to the educational process, found some basis from Brown v. Board of Education, such as the Civil Rights Act of 1964 (and its amendments), and Title IX legislation. In addition to this derivative background, the law is a reaction of Congress to the pressures and demands of special interest groups for some federal legislation that will put pressure on state and local districts to ensure that education for the handicapped will be a guaranteed right.

The stated purpose of P.L. 94-142 is:

> ...to assure that all handicapped children have available to them...a free, appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist states and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.
>
> P.L. 94-142, Sec. 3(c)

P.L. 94-142 is a complete revamping of Part B of the former Education of the Handicapped Act, 20 USC 1404, et. seq. The primary focal point of the enactment is to assure a "free, appropriate public education for all handicapped children" with emphasis upon the individual needs of every handicapped child, procedural safeguards for handicapped children and their parents, providing free, appropriate public education to all handicapped children in the least restrictive environment, and to establish a method of monitoring the efforts of the various State and local educational agencies. The means utilized by Congress to assure the achievement of these goals is providing the availability of Federal funds to the various states for local distribution but only upon compliance with the requirements of P.L. 94-142 and the interpretive regulations promulgated by the Commissioner of Education of the U.S. Department of Education. As stated previously, P.L. 94-142 revised Part B only of the existing Education of the Handicapped Act and other components of the Act remain intact.

The responsibility of putting the mandates of P.L. 94-142 into operation and monitoring state and local compliance is vested in the Bureau of Education for the Handicapped, U.S. Office of Education, Department of Health, Education and Welfare. To this end, the U.S. Commissioner of Education has promulgated certain proposed regulations for the interpretation, implementation and monitoring of the mandates set forth in P.L. 94-142. The legislation is a complicated structure of eligibility requirements of both an initial and a continuing nature for the receipt of the available Federal funds and for procedural safeguards for handicapped children and their parents. Due to the complexity of the law and intricacies of the subject areas, the proposed regulations have, in some instances, gone well beyond the statutory language. The net result of both P.L. 94-142 and the proposed regulations presently is that the burden of compliance is placed upon individual local educational agencies; of particular concern to counsel for a local school district is the potential for a myriad of administrative hearings and actual litigation in both state and federal jurisdictions.

P.L. 94-142 specifically ordered the Commissioner of Education to promulgate and publish proposed regulations consistent with the purpose and mandates of the Education for All Handicapped Act of 1975 in two specific areas. Firstly, regulations were to be published regarding (1) establishment of specific criteria for determining whether a particular disorder or condition should be considered a "specific learning disability", and (2) methods of diagnosis and monitoring the methods used to determine the existence of a specific learning disability. Secondly, the Commissioner of Education was to promulgate a set of proposed regulations concerning the entire Act and methods of implementing the legislatively created system of providing a free, appropriate public education to all handicapped children through federal assistance.

PROPOSED REGULATIONS: THE PRACTICAL EFFECTS

Pursuant to the legislative authorization, the Commissioner of Education promulgated and published regulations effecting the operation and implementation of P.L. 94-142. The first set of regulations were published in the Federal Register on November 29, 1976 (42 FR 52404). These regulations were addressed to the specific area of establishing criteria for the determination of "specific learning disabilities" and identifying children with these conditions. By definition, "children with specific learning disabilities" are those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written. The disorder may manifest itself in imperfect ability to listen, think, speak, read, or write, spell or do mathematical calculations. Such disorders include conditions such as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. Such terms do not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or environmental, cultural, or economic disadvantage. It was the concern of Congress, as well as experts in the field of special education, that children should not be unnecessarily and erroneously be stigmatized as having specific learning disabilities.

TEAM EVALUATIONS AND ASSESSMENTS

The proposed regulations to avoid mislabeling and to provide a thorough method of evaluation are most encompassing. They present problems and issues which ultimately will be the concern of school attorneys. First, the regulations require that each agency responsible for determining if a child has a specific learning disability must use a team to make such an evaluation; in most cases, this agency will be a local school district. The team must be comprised of 1) the child's regular teacher or, if she/he has none, a regular classroom teacher certified to teach a child of that age; if the child is less than school age, the teacher must be certified to teach children of that age group; 2) a teacher with training in the area of specific learning disabilities; and 3) an individual certified by the state to conduct individual diagnostic examinations of children. This team must meet at least once after each member has performed individual diagnostic evaluations to discuss the evaluations and to reach a conclusion on whether the child has a specific learning disability. The regulations specifically set forth a formula for the determination of the existence of a specific learning disability based largely upon achievement levels in specific areas of evaluation. When a team believes that a child has a medical problem which is educationally relevant, it is required that they request that a medical examination be sought by the parents, and the results of this examination be included in the team report. Evaluation shall also include observation of the child's academic performance in the child's regular classroom environment. Once a decision is reached, the team must provide a written report detailing procedures, standards, observations during evaluation and the basis of their determination. The regulations also call for monitoring of these evaluations by the SEA and that a report on this monitoring be included in the state's annual program plan.

The comments to these proposed regulations have pointed out areas of real concern to local school districts and indicate a real potential for the involvement of school attorneys. Individual teachers and representative professional associations have challenged the practicalities of the team system. Their contention is that the elaborate procedures called for in the regulations go far beyond the Congressional enactment in the particular. One of the major arguments of the teachers is that these regulations place an additional burden on their schedule, as more time and responsibility is required in evaluation, meeting and writing the required report. They demand that specific regulatory language state that whenever appropriate, these duties not be performed during normal school hours and that it be at the convenience of the teachers; that specific language require that these duties are to be considered additional or supplemental to regular duties and that they be compensated accordingly; and that teachers should not be placed in the position of being forced to perform services not consistent with contractual requirements in the various local school districts.

Local school districts have expressed concern over the future teacher demands in contract negotiations and the added expense that will be occasioned if teachers are removed from regular classroom duties and substitute personnel must be hired to replace them. The net result is that if the local school district is to comply with the state's annual program plan it must make the mandated evaluations; if there is non-compliance, the local allocation of federal funds will be withheld by the state. In order to comply, the local districts must require more services from the teachers involved and the teachers, realizing the district's dilemma, can utilize the situation for increased demands in compensation and benefits at the time of contract negotiations.

GENERAL 94-142 REGULATIONS

The other set of proposed regulations published by the Commissioner of Education encompassed the entire Act. These proposed regulations appeared in the *Federal Register* of December 30, 1976 (42 FR 56966, *et seq.*). In the preamble to the regulations, it is stated that the Commissioner has attempted to initiate regulations where needed and has left the statutory language intact where regulation was unnecessary. For the most part, the regulations are free of surplusage, however, in those areas where the legislation has been expanded by regulatory action, the foreseeable results are confusion and involvement of counsel. In preparing this presentation, it was deemed appropriate that counsel to various school districts should be aware of the response to the proposed regulations

As stated earlier, P.L. 94-142 totally revised Part B of the existing Education of the Handicapped Act, which was initially enacted in 1970 as an effort on the part of the Federal government to assure handicapped children appropriate educational opportunities on a national scale. P.L. 94-142 was enacted to provide substantial financial assistance to the state and local educational agencies so that the special needs of the handicapped child could be met by providing a free, appropriate public education in the least restrictive environment. Naturally, as with all federally funded programs, the eligibility and compliance requirements mandated by Congress and the regulations promulgated by the Commissioner of Education are extensive.

The underlying thread within all of the requirements is that a free, appropriate public education shall be provided to all handicapped children. as defined by statute and regulations, equal in character to the free public education provided to non-handicapped children. Prior to this statutory emphasis, the issue of equal education was a matter of judicial order and the enforcement under the authority of the due process and equal protection arguments as applied to the various states through the Fourteenth Amendment to the United States Constitution.

CASE LAW: EDUCATION OF THE HANDICAPPED

More than twenty years ago, equality in education was brought to bear in the landmark decision in Brown v. Board of Education, 347 US 483 (1954). As you know, involved in that case was the issue of the rights of black children to equal and integrated educational opportunities within a state. The essence of the holding in Brown was that no state or agency thereof shall, by statute or practice, deny any child educational opportunities equal to those enjoyed by all other children in the state based on race. Thereafter, a whole series of civil rights cases surfaced involving racial discrimination in education based upon the argument of equal protection under the law and procedural due process standards. As a result of these decisions, litigation surfaced involving the educational equality of other designated classes. In response to the surge of litigation in the field of civil rights, Congress and state legislatures enacted appropriate legislation to provide guarantees that discrimination of the various categories would not be tolerated.

The first major litigation involving the rights of the handicapped to equal educational opportunity was Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), modified by 343 F. Supp. 279 (E.D. Pa. 1972), hereinafter referred to a PARC. In that case, the Pennsylvania statutory structure was attacked by the representative organization on behalf of all retarded children in Pennsylvania and several individually named retarded children.

Pennsylvania statutes permitted the failure to educate a retarded child if that child was determined to be "uneducable". Plaintiffs produced a wealth of evidence showing that all children are educable in one way or another. Their attack on the statutes was bifurcated. The first contention was that the exclusion of a retarded child from an education by merely classifying him "uneducable" was a denial of procedural due process, where no adequate prior notice of the exclusion was required and no provisions for an impartial hearing to determine the validity of the exclusion existed. This contention stressed that due to the importance of the interest denied (education) and the damaging stigma that would follow an excluded child, it was necessary that such action required a constitutionally sufficient hearing. The second allegation put forth by the plaintiffs was that the exclusion violated principles of equal protection. In support of this argument, it was argued that because of overwhelming evidence which pointed out the irrational standard of "uneducable" the exclusionary provision could survive neither the rational relationship test not the compelling state interest test commonly applied to questions of equal protection.

Untimately, PARC was resolved by a consent decree between the parties and approved by the Court after it was determined that the plaintiffs had stated caused of action in their complaint. The essence of the consent decree called for an injunction on the enforcement of the statutory exclusion and an order to provide to every mentally retarded child in Pennsylvania access to a free, public program of education and training appropriate to that child's learning capacity.

MILLS v. BOARD OF EDUCATION

A federal case of even more magnitude and importance for the equal education fight of the handicapped was Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972), hereinafter referred to as Mills. Mills served as a stronger precedent for three separate reasons. Firstly, Mills was actually determined on the merits. Secondly, Mills was a class action brought on behalf of all handicapped children residing in the District of Columbia. Thirdly, Mills did not involve statutory exclusion but rather attacked the local practice of removing handicapped children from the educational system through informal means or denial of any special educational placement. The Court held that the denial of adequate public education opportunities to handicapped children is violative of due process guarantees as it affects all children in the schools within the age range of the District of Columbia Compulsory Attendance Law. Additionally, the court reasoned that procedural due process demands that there be a right to request an impartial hearing prior to a child's placement in a class for handicapped children, specifically requiring notice, impartial hearing officer, opportunity to challenge proposed placement and to present evidence for alternative placement. The court ordered that the school district was obligated to provide handicapped children with an adequate education appropriate to their needs and that special education placement without an evaluation of the child's needs would fall short of this obligation.

EQUAL EDUCATION COST FACTORS

PARC and *Mills* are primary examples of the judicial awareness that all children, regardless of their particular handicap or limitation, must be provided a free, appropriate public education that will enable them to develop intellectually and socially to the highest degree possible. Equal educational opportunities for all children was the net substantive result of *PARC*, *Mills*, and their progeny. It goes without saying that in order to provide the handicapped child with educational opportunities equal to those of other children additional costs factors are involved. As it became apparent that state and local education agencies would be required to provide equal education to all, the various states and local districts began devising financing programs to meet this new dimension in equal education. Each program varied in character and quality based largely on the financial capabilities of the state of locality involved. The primary and usual source of income for the financing for a majority of districts' education programs comes chiefly from the property base of each particular district. Because each local district's expenditure capability depends on the property wealth found therein, another issue of past litigation must be addressed. Is it not a denial of equal protection to say that the educational opportunities of handicapped children will be better in one district because of property wealth than in another district because of property poverty, or for that matter, one state compared to another?

To some degree, this question was answered in the negative in the case of *San Antonio Independent School District* v. *Rodriguez* , 411 US 1 (1973). In this case, the Supreme Court was confronted with the question of equal protection and equal education in light of real disparities in the financial capabilities of the various school districts. In their opinion, the majority held that while education is an important interest which could affect constitutionally guaranteed rights such as voting, speech and press, it was *not per se* constitutionally guaranteed either explicitly or implicitly and, as such, was not a fundamental interest for the purposes of equal protection analysis. Additionally, the Court held that classifications and distinctions among local districts which affected the comparative per-pupil expenditures based upon property wealth, which effectively meant that one district was treated differently than another, was *not* suspect classification for the purposes of equal protection analysis.

Accordingly, if education is not a fundamental interest and different treatment between districts based on wealth is not suspect classification, then the state or local program of education funding based on such classification is presumed valid. (See Lindsley v. National Carbonic Gas Co., 220 US 61, 1911). In such a case, the state or local agency can constitutionally justify the unequal treatment merely by demonstrating that the classification has some rational relationship to a permissible state interest or objective. (See Morey v. David, 354 US 457 , 1957). Many education reform advocates and special interest groups initially reviewed Rodriguez as the end of progressive judicial expansion in the area of equal education for all children. It was felt that the Rodriguez decision would seriously hamper efforts within states and local districts to obtain increased funding for the special needs and additional costs of the handicapped children. (See Cuyahoga County Association for Retarded Children v. Essex , 411 F. Supp. 46 (N.D. Ohio, 1976)).

Perhaps in response to the obvious ramification that Rodriguez could have on the funding of education programs and the demands for substantive action brought about by PARC, Mills, and their progeny, or as a natural extension of the growing concern for increased Federal funding, guidelines, regulations and monitoring of education of the handicapped as well as safeguards for the rights and interests of the handicapped children and their parents, Congress set about to make expansive revisions of the Education of the Handicapped Act. Specifically, Congress sought to increase and clarify the federal assistance to the states and at the same time create uniformity in the programs offered and assure procedural due process and confidentiality safeguards.

P.L. 94-142: INTERPRETIVE ANALYSIS

One of the most obvious concerns involved in educating handicapped children in a public education system, yet one often given too little attention, is the problem of actual physical architectural barriers in existing public school buildings, facilities and equipment. P.L. 94-142 added 20 USC 1406 which authorizes the appropriation of such sums as may be necessary to pay part of or all of the cost of altering existing buildings and equipment so that they can be used by and are accessible to handicapped individuals. The appropriate sums are to be separate from those funds involved in the main assistance grant provisions and shall be available to any state or local educational agency or intermediate educational unit upon application to the U.S. Commissioner of

Education. Additionally, this provision and the appropriations involved have the effect of emergency legislation in that it is effective the date of enactment. As a practical matter, no free, appropriate public education can be provided to all handicapped children in the least restrictive environment if the facilities to be used physically deny access to any handicapped child.

Since the stated purpose of this Act is to provide and assist states and local districts in implementing a "free, appropriate public education", it is of interest to not what Congress meant by this term:

> (18) The term "free, appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the state educational agency, (C) include an appropriate preschool, elementary or secondary school education in the state involved, and (D) are provided in conformity with the individualized education program required...

In the definition, particular attention should be noted to the emphasis on public expense, the encompassing education program and the requirement of conformity with the individualized program (IEP):

> (19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child,

> (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) the appropriate objective criteria and evaluation procedures and schedules for determining, on at least and annual basis, whether instructional objectives are being achieved.
>
> P.L. 94-142 Sec. 4(a)

One additional definition which was originally set forth in the previous Federal legislation is that of "handicapped children":

> (1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.
>
> 20 USC 1401

DETERMINING AMOUNTS OF ASSISTANCE

Since the main thrust of P.L. 94-142 is to provide federal funds to assist state and local education agencies in assuring the provision of "free, appropriate public education" to all handicapped children, it would be of interest to know how much assistance we are talking about and the method by which it is computed. Section 611 of P.L. 94-142 (20 USC 1411) sets forth the state and local entitlements and allocations. Congress has utilized a formula grant approach to determine the maximum state entitlement and the local flow-through allocations. Simply stated, that state maximum entitlement is equal to the number of handicapped children in a state between the ages of 3-21 years receiving special education and related services, multiplied by a percentage of the "average per pupil expenditure in public elementary and secondary schools in the United States". This percentage is on an increasing scale, in that for the fiscal year 1978 it is 5%; fiscal year 1979 is 10%; fiscal year 1980 is 20%; fiscal year 1981 is 30%; and for fiscal year 1982 and every year thereafter, it is 40%.

To clarify this by example, based upon national figures available at the time of the enactment of P.L. 94-142 (1975), the national average per pupil expenditure was approximately $1, 250.00. Assuming for the purposes of this example that this average remains constant and that the national number of handicapped children to be counted remains constant, (approximately 6.2 million in 1975), the following breakdown of entitlement would exist:

FY 1978	$387 million (at 5%)
FY 1979	$775 million (at 10%)
FY 1980	$1.2 billion (at 20%)
FY 1981	$2.32 billion (at 30%)
FY 1982	$3.16 billion (at 40%)

There is an additional provision in this section that states that no state shall receive an amount less than the amount received in FY 1977. Additionally, there is a provision that calls for ratable reduction of the state amounts if the actual amount appropriated is less than the total entitlement amount as determined by the formula. As a practical matter, it would appear that there will be ratable reductions every year if current situations are any indication of what the future will be. In FY 1977 the actual appropriation would be $315 million with the possibility of an additional $50 million. Add to this disparity the fact that the number of handicapped children will undoubtably increase and the uncertainty as to the rise of average per pupil expenditure, it is readily obvious that actual appropriations will more than likely fall short of projected formula entitlements.

In order to be eligible to receive any authorized federal funds under this Act, LEAs must assure the SEA in its application for participation that an IEP will be established for each handicapped child at the beginning of each school year. The Federal funds shall be distributed to the individual states in accordance with the formula grant provisions and actual appropriations. P.L. 94-142 calls for a sizeable portion of these funds to be passed on to the LEAs of the state. For FY 1978, 50% of the funds received by the state is to be passed on to local districts. In FY 1979 and therafter, 75% of the state funds will go to the local districts.

The Act imposes certain restrictions on the eligibility of an LEA to receive these alloted funds from the state. The SEA must withhold an LEA's funds if (1) the LEA does not conform with the overall state plan requirements of P.L. 94-142 and existing state law, i.e., least restrictive environment, IEP, confidentiality, procedural due process safeguards, etc.; (2) the LEA fails to meet local application requirements, i.e., child identification, confidentiality, facilities, personnel development, priorities, parent involvement, participation in regular education programs, excess cost and nonsupplanting provisions, comparable services, reports and records, public participation and procedural safeguards, all of which are required to be included in a local application in the form of specific assurances; (3) the state deems the LEA unable to make effective use of its entitlement unless it consolidates its entitlement with the entitlement of one or more other LEAs; (4) the program for handicapped children within the school district is insufficient in size and scope; (5) the LEA is adequately providing a free, appropriate public education for all handicapped children with state and local funds (this is a permissive restriction giving state agency discretion); (6) if the allocation for the LEA based on the formula grant provision does not amount to at least $7,500.00 in which case the SEA assumes the responsibility for the education program to the handicapped children, unless the smaller LEAs merge into an intermediate educational unit.

TIMETABLE FOR COMPLIANCE

P.L. 94-142 sets forth a definite timetable for SEA and LEA compliance with the requirements of the Act in order to be eligible for Federal funding. Each SEA must have an approved annual program plan that assures essentially that a free, appropriate public education is being afforded to all handicapped children between the ages of 3 through 18 by September 1, 1978, and further, that the availability of such education must be assured to all handicapped children between the ages of 3 through 21 by September 1, 1980.

It should be emphasized to the state and local school districts that the authorized funds of P.L. 94-142 are to be expended only for those "excess costs" which are attendant with the higher costs of educating handicapped children. To assure this, P.L. 94-142 requires each local district to determine its average annual per-pupil expenditure for all children being served, and then apply the use of federal funds only to those additional or excess costs for handicapped children which exist beyond indicated average annual per-pupil expenditure.

In addition to the comprehensive provisions for SEA and LEA eligibility to participate in the funding program and the restric- on the use and allocation of these funds, P.L. 94-142 provides certain guarantees to the handicapped child and his parents or guardian. The guarantee of an IEP places the main responsibility for the development, revision, review and evaluation of the IEP upon the local school district. As the definition of the IEP reflects, each handicapped child will have a written education program which must be the result of meetings between the LEA administrator responsible for special education, the child's teacher, the parent or guardian, and the child, if appropriate. The IEP is required to be a detailed program of the current education level of the child, desired achievement goals for the year-end, special education needs and related services, when the child can participate in regular education programs, physical education provisions, short-term objectives with anticipated dates and durations of these, and specific provisions and criteria for evaluation of the IEP based on actual achievement of the child.

DUE PROCESS SAFEGUARDS

Section 615 of P.L. 94-142 (20 USC 1415) provides that any educational unit, state, local or intermediate, which receives federal assistance under this Act must establish minimum procedural provisions which will "assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free, appropriate public education by such agencies and units". The minimum procedures required must include (1) an opportunity for the parents or guardians to examine all relevant records regarding the identification, evaluation, and educational placement of the child, the provision of a free, appropriate public education to the child, and to obtain an independent educational evaluation of the child; 2) procedures for the appointment of an individual, not employed by agency or unit providing the education or care of the child, to act as a surrogate for the parents or guardians if they are not known, unavailable, or if the child is a ward of the state; 3) written prior notice to the parents or guardians whenever the agency or unit proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free, appropriate public education to the child; 4) procedures which will assure that the written notice mentioned above fully informs the parents or guardians in their native language, unless clearly not feasible to do so, of all procedures and safeguards provided; and 5) an opportunity to present complaints regarding the identification, evaluation, and educational placement of the child, or the provision of a free, appropriate public education to the child.

If a parent or guardian elects to file a complaint with the agency or unit involved, an opportunity shall be provided for "an impartial due process hearing" conducted by the SEA, LEA or intermediate education unit, "as determined by state law or by the state educational unit"; however, such a hearing shall not be conducted by an employee of the agency or unit responsible for the education or care of the child. If the "impartial" due process hearing is conducted by a LEA or intermediate education unit, then any party aggrieved by the finding or decision may appeal to the state education agency which shall conduct an impartial review and the review officer shall render an independent decision. Any party, which would include a local school district, to either the "impartial due process hearing" or the state level review hearing shall have(1) the right to be accompanied by counsel and "by individuals with special knowledge or training with respect to the problems of handicapped children"; (2) the right to present evidence and to confront, cross-examine and compel the attendance of witnesses;(3) the right to a written or electronic verbatim record of the hearing; and(4) the right to written findings of fact and decisions, a copy of which must be sent to a state advisory panel that is required to be established in every state participating in the federal assistance program.

If an aggrieved party fails to perfect the review procedure under State law of the local hearing or if an aggrieved party takes exception to the decision of review proceedings at the state level, that party is specifically guaranteed the right:

> ...to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any state court of competent jurisdiction, or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive records of the administrative proceedings, shall bear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.
>
> (emphasis added)
>
> P.L. 94-142 § 615(e) , 20 USC 1415(e) (2)

Thus, if a parent or guardian complains of any matter regarding the identification, evaluation, or educational placement of a child or the provision of a free, appropriate public education to a child, they must be afforded the opportunity to avail themselves of the use of the review procedures. Special emphasis is directed to the fact that at the initial hearing which is on the local level, it has all of the characteristics of an adversary proceeding. While the language of the act has provided extensive procedural due process safeguards for the child and the parents or guardians, the proposed regulations promulgated by the Commissioner of Education expanded upon them even more, as shall be demonstrated later.

P.L. 94-142 goes on to relate that while all of the proceedings provided in the Act are conducted, the child shall remain in the then current educational placement, or if the child is applying for initial admission to a public school, he shall, with parental consent, be placed in the public school program until the completion of all proceedings.

PRE-SCHOOL GRANTS

As stated previously, this Act concentrates on handicapped children between the ages of 3 through 21. Realizing that most states do not provide public education to children of pre-school age (3 through 5) and realizing the need for early evaluation, placement, education and training of this age group of handicapped children, Congress provided additional incentive grants. Section 619 of P.L. 94-142 provides that any state that has met the eligibility requirements, has an approved state plan, and provides special education and related services to handicapped children between the ages of 3 and 5, inclusive, who are counted for the purposes of the formula grant provisions shall receive from the Commissioner of Education an additional grant; the maximum amount of this grant for any fiscal year shall be $300.00 for each pre-school child. Additionally, any state that is eligible under this Act and has an approved state plan may apply for an incentive grant by supplying the Commissioner of Education with such information as he may require.

COMMENTS RECEIVED BY H.E.W. AS OF MARCH 16, 1977

Again, due to time restrictions and the breadth of the area involved, attention shall be concentrated on areas of particular concern to school attorneys.

For the most part, the areas involving the monetary allotments, state annual program plans, local education agency applications, and monitoring of the programs and efforts of the SEAs and LEAs do not go beyond the statutory provisions. Areas which have been subject to regulatory attention and public commentary have been the individualized education program, procedural safeguards, and confidentiality.

The IEP provision of the regulations require that each IEP be written at the beginning of each school year. If a child is receiving special education, then the required meeting should be held prior to the next school year and if a child is determined by the board of education to be defined as handicapped during a school year, then the meeting required must be within 30 days of the handicap determination. The regulations enlarge the participants of the IEP meeting to additionally include any other person at the discretion of the parents or agency. Teacher groups have been the most vocal in this area, contending that it creates an undue burden on them, and gives too much control to parents who are emotionally involved, not professionally trained, and it creates potential liability for participating teachers. The liability they are concerned about is of a civil nature. The teachers

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argue that since the IEP is written and states what efforts will be expended in order to accomplish a stated level of achievement in the child's education by year-end, it could be construed to create a contractual obligation. They, as well as local school districts, want specific statutory or regulatory language that states that the participants of the IEP planning meeting create no liability if a child cannot or does not achieve the goals set out in his/her IEP. It is my opinion that there is ample language in the Congressional record that it was not the legislative intent of Congress to create such a liability and the Bureau of Education for the Handicapped (hereinafter referred to as "Bureau") forsees supplementation to the regulations to this effect.

In the area of procedural safeguards and due process guarantees, the Commissioner of Education has enlarged the rights and interests of the parents beyond the scope of the Act. As an example, the statute calls for the parental right to obtain an independent educational evaluation if they disagree with the evaluation of the local district; however, the statute does not say who will pay for this independent evaluation. The regulations state that it shall be at public expense unless the local agency initiates an impartial due process hearing and demonstrates that the original evaluation is appropriate. The regulations also state that before an evaluation is conducted, parental consent must be obtained, yet no such language appears in the Act. Relative to the impartial due process hearing and state-level administrative appeal, it is required that these hearings shall commence no later than 45 days after receipt of a complaint or appeal and that the time and place of the hearings must be at the convenience of the parents or child.

It is interesting to note that in the Act concerning the availability of civil action to an aggrieved party, the Congress states a specific burden of proof to be met, that being "preponderance of the evidence". It would then be logical to apply this burden at the administrative-level hearings. As indicated previously, these hearings must be viewed from the outset as an adversary proceeding. Many local administrators have commented that the rights given to the parents act as a bar to progressive re-evaluation of a child according to his/her unique needs and potentially impedes progressive special education at crucial periods of a handicapped child's educational development. It should be noted that the parents are guaranteed these specific safeguards, however, if the handicapped child is mentally competent and of legal majority, there is no prohibition against him or her enforcing these rights and utilizing these opportunities.

The proposed regulations called for the designation of a surrogate to act in the interest of the child if for some reason a parent cannot be involved. The flow of commentary to this provision has centered around the implementation and potential liability of this provision. Many states do not presently have adequate statutory authority for the appointment of a surrogate parent in a manner that affords the appointee protection from liability attacks for evaluation or placement which may occur while acting in the appointed capacity. Similarly, there is a lack of adequate safeguards directed towards those individuals who would make the required appointment. As a result, comments on the part of administrators to make the appointment when necessary, and potential volunteers to serve as surrogates are reluctant to seek and accept an appointment where there is little clarity as to their potential civil liability.

Confidentiality of collected data and information is enlarged in accordance with prior legislative and regulatory enactments. Education agencies are prohibited from making available personally identifiable data unless prior written parental consent is obtained. Additionally, all personally identifiable information must be destroyed within 5 years after it is no longer needed for the provision of educational services to the child. The provision has been challenged on the basis that in many cases a handicapped individual will need certain data concerning his handicap while in school for future use and this requirement necessitates separate record keeping at additional and unnecessary costs to local districts, as well as conflicting with some state laws.

RESPONSE TO P.L. 94-142 BY THE STATES

Prior to, or contemporaneous with, the formulation and enactment of P.L. 94-142, several states had taken major local steps to provide similar assurances of free appropriate public education to all handicapped children. Since 1974 the Commonwealth of Massachusetts has had in effect legislation calling for a state plan, local applications, specific assurances of educational and procedural rights and a system of monitoring local efforts. Likewise, the states of Minnesota, Idaho, and Florida have established plans for the monitoring of local efforts in the provision of special education.

In 1976, the State of Ohio completely revised existing statutes concerning the education of the handicapped. Within the statutory framework, Ohio has created a formula grant provision for the allocation of state funds to school districts, not only for handicapped children, but also for educationally and culturally disadvantaged students. Requirements are established for reporting necessary data and monitoring local efforts at providing an appropriate public education. The handicapped children and their parents or guardians are statutorily afforded all of the procedural and confidentiality safeguards that are found in P.L. 94-142.

As of March 16, 1977, the Bureau had indicated that only one state annual program plan had been approved and that within 3 weeks another four or five plans would probably receive approval. The Bureau has been working closely with the various state education agencies. It is foreseeable that in the very near future, the emphasis of planning, preparation and implementation shall come to bear upon the local school districts of the various states. If any educational agency wishes to participate in the available federal funding, it will require strict adherence to all of the standards set forth in P.L. 94-142.

CONCLUSION

P.L. 94-142 has been referred to in some circles as the Lawyers Full Employment Act. While no specific duties or responsibilities are set forth for counsel to the local school districts, one can readily visualize a number of inquiries and demands that will be referred to counsel. Already, many states, not to mention local districts, are at a loss as to their compliance requirements. Once a district is receiving assistance under P.L. 94-142, careful scrutiny will be required in the areas of affording complete procedural due process to the handicapped child and his/her parents. The network of administrative hearings and the availability of state or federal court jurisdiction without regard to monetary amount will inevitably result in a number of Federal Court challenges to evaluations, placements, and individualized education programs, or the local district's refusal to do so. As in prior legislation, extreme caution regarding confidentiality of records should be exercised in order to avoid potential liability.

It would be in the best interest of counsel to review P.L. 94-142 and the proposed regulations for the purpose of future consultation with their respective districts and to establish avenues of communication with state agencies to assure compliance. The true effects of P.L. 94-142 will not be known for many years. Initially, the burden of implementation appears to outweigh the benefit of this legislation. While the Education of All Handicapped Children Act of 1975 does not provide a panacea for all inequities in the education of handicapped children, it is a major step towards assuring the provision of free, appropriate public education for all children regardless of race, sex, national origin or unique handicap. Hopefully, through experienced revision and amendments, we shlal have equality in education for all. In the meantime, your labors must be directed towards compliance with and, where necessary, the challenging of the provisions of P.L. 94-142.

Throughout the legislation and the regulations there is the underlying current that emphasis placed upon the efforts to provide opportunities to handicapped children for equal education rather than emphasizing the achievement of specific goals.

Idealistically, we would love to have every handicapped child achieve the maximum benefit of an educational system, however, because of restrictions in personnel capabilities, financial resources of districts, uncontrolled family environments, it may be an unobtainable goal.

One of the most controversial features of the entire legislation is the expansive guarantee of parental control over the determination of the course of educational opportunities to a handicapped child. At every juncture the parent must be notified and must give their approval to evaluations, placement and changes relating to the education of their child. Realistically, the decisions made by the parent will be based upon emotional considerations. It is my opinion that these procedural safeguards, while sounding like constitutional rhetoric, may be no more than congressional appeasement of the desires of interest groups to have parents be an integral part of the education of their children. The net result of all this is total chaos in the educational process, where the local district is attempting to provide the best possible educational opportunities under the various circumstances and at the same time attempting to appease the desires and interests of the parents. Naturally, the parents are looking towards recognizable achievements by their children, whereas educators are looking towards providing opportunities for development of any intellectual potential of a child.

Under the procedural safeguards provided by P.L. 94-142, a parent could lock the necessary placement of a child indefinitely. For example, if a child with obvious problems is in a regular classroom situation and the parent for some personal reason is not desirous of having the child stigmatized as handicapped, that parent could lock any evaluation and placement. As a result, the child will continue to be subjected to experiences of failure within the public education system, the ridicule of peers and , ultimately, the possibility of emotional destruction of personal pride and achievement.

Realizing the need to have more involvement of the parents, perhaps emphasis should be placed more on parental input and allowing the ultimate determination to be placed in the hands of professionals, based in part on the parental input.

The concept of equal educational opportunities is often interpreted into achievement-oriented terms whereas when in fact it is better to provide the handicapped child with opportunities for development without any emphasis on achievement. Perhaps the most important thing to assure a child with educational handicaps is that he or she not suffer the experience of rejection, ridicule and failure because of a condition that he/she has no control over, and no hope of eliminating.

Under the present status of the law, the best that a local school district can do is to demonstrate to federal and state authorities, as well as local parents that they are making efforts to provide a full educational program for handicapped children in which they can develop to their full potential.

It is my feeling that Public Law 94-142 may be viewed by legislators as the final response to the demands of handicapped children advocates. However, under our present social structure and government, to provide equal educational opportunities for all handicapped children remains a desirable, although illusive, goal.

THE COUNCIL OF SCHOOL ATTORNEYS

The Council of School Attorneys was organized in 1969 to provide a national forum for those who are concerned with the practical legal problems faced by local public school officials and to promote a closer relationship between them and their client boards. Under the aegis of the National School Boards Association, the Council has now grown to over 800, with representatives from almost every state and the District of Columbia.

Membership in the Council is open to attorneys at law who are licensed to practice before the highest court of any state of the United States of America or before a court of record in the United States of America; and who are (or have been within the immediate past 2 years) attorney for a local public school district, a state school boards association or any public junior or community college.

Also, the entire membership of any state council of school attorneys sponsored or recognized by a state school association affiliated with NSBA may secure integrated membership with the Council.

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